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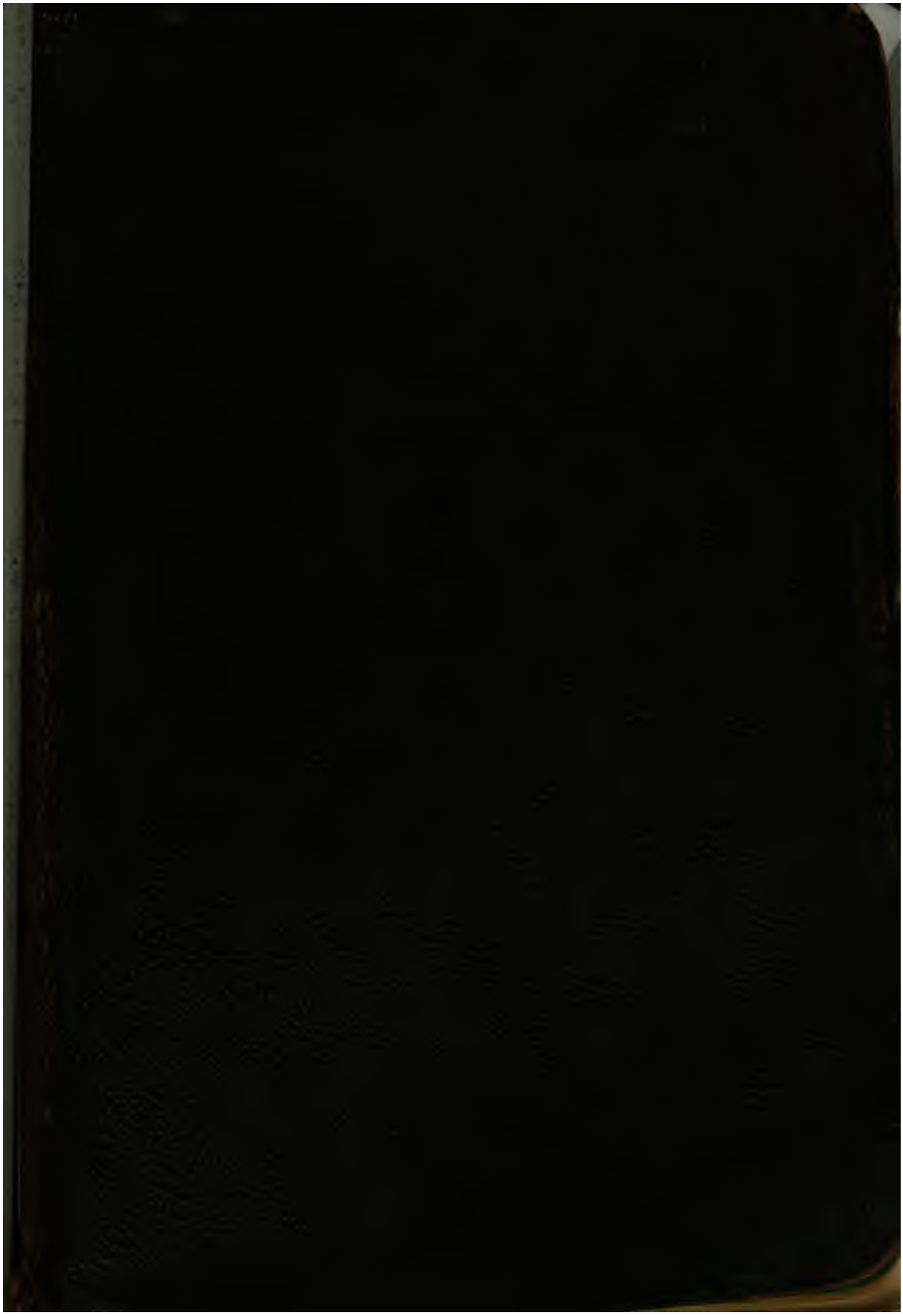

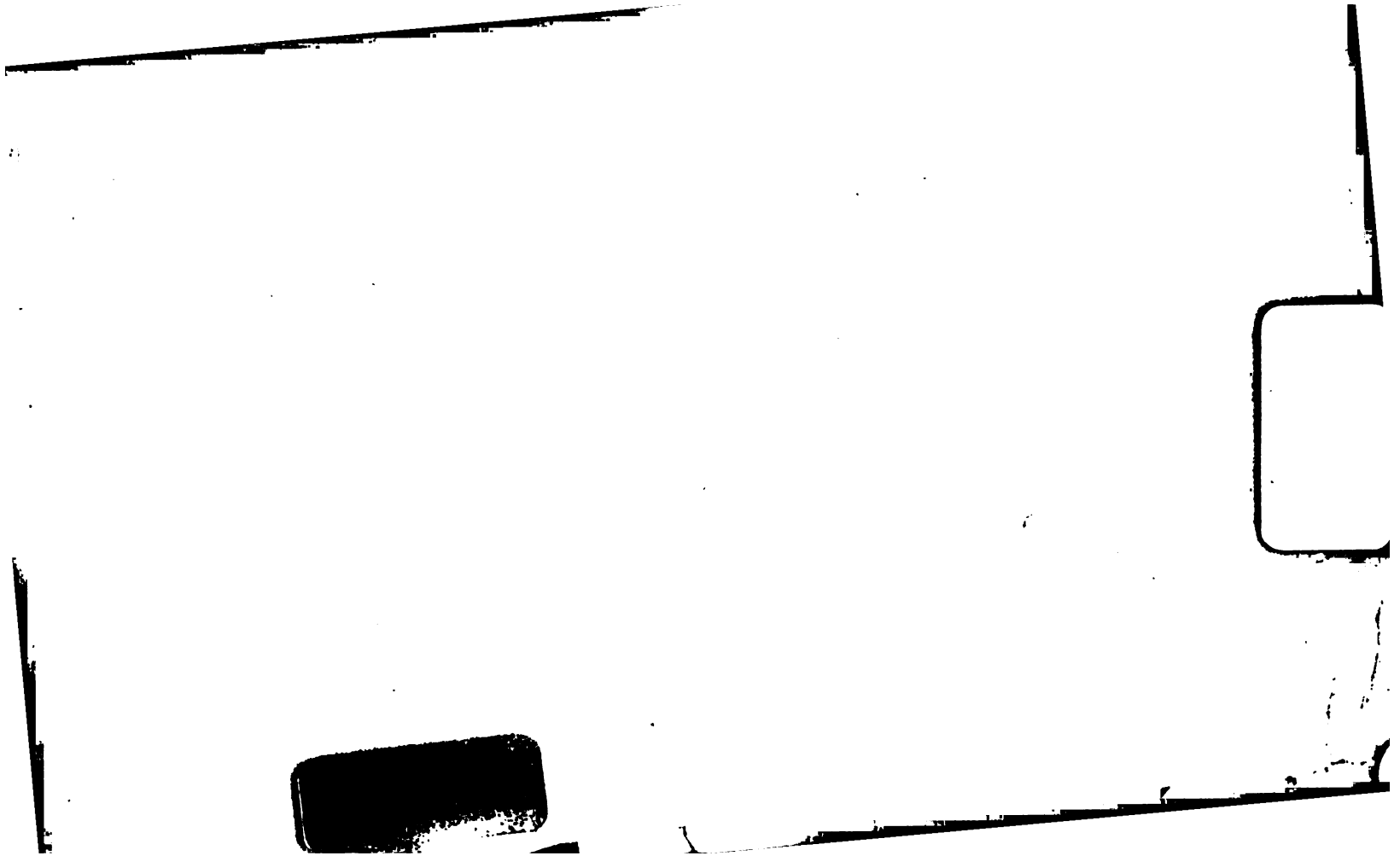

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A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms, with a Revised Edition of Blackstone's Commentaries

PREPARED BY

JUDGES, MEMBERS OF THE BAR, TEACHERS IN LAW SCHOOLS, AND WRITERS ON LEGAL SUBJECTS

UNDER THE EDITORIAL SUPERVISION OF

EUGENE ALLEN GILMORE, A. B., LL. B.
PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN

ASSISTED BY

WILLIAM CHARLES WERMUTH, M. S., LL. B.
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CRIMINAL LAW

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WILLIAM E. MIKELL, B.S.,
PROFESSOR OF LAW, UNIVERSITY OF PENNSYLVANIA

LAW OF CRIMINAL PROCEDURE

BY

WILLIAM L. BURDICK, A.M., Ph.D., LL.B.,
PROFESSOR OF LAW, UNIVERSITY OF KANSAS

LAW OF PERSONS AND DOMESTIC RELATIONS

BY

ELMER M. LIESSMANN, LL.B.,
LAW LECTURER, NORTHWESTERN UNIVERSITY

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PREFACE.

The attention of citizens generally is being attracted to a reform of our penal institutions. Some progress in that direction has been made by legislation and some by improvements in state institutions. Thus many of our offenders are now treated as "patients" for the surgeon or physician rather than as criminals to be confined in penitentiaries. Public-spirited bodies are also investigating the causes of crime and are seeking to find ways and means for its prevention.

Success in reducing the number of criminal offenders rests largely upon a reform in the administration of criminal law and criminal procedure as enforced in the courts today. In turn, a knowledge of the basic principles of these branches of the law is the first essential to reform.

The first two treatises in Volume III of Modern American Law are commentaries on the principles of criminal law and criminal procedure. Professor William E. Mikell, B.S., University of Pennsylvania, the author of "Criminal Law," discusses and distinguishes concretely the various offenses against society. Professor William L. Burdick, Ph.D., LL.B., University of Kansas, in "Law of Criminal Pro-

cedure," explains the rules of procedure that apply in criminal trials.

The third treatise in this volume, "Law of Persons and Domestic Relations," by Elmer M. Liessmann, LL.B., of Northwestern University, treats this subject under three heads: (1) Parent and Child; (2) The Infant; (3) Husband and Wife. Mr. Liessmann illustrates and outlines the specific duties and rights pertaining to these relationships. He traces the origin of those duties and rights under the common law, and shows their development under statutes. Portions of state statutes bearing upon this branch of the law are quoted in full and serve as illustrations.

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CRIMINAL LAW

BY

WILLIAM E. MIKELL, B.S.*

PART I

INTRODUCTORY TOPICS

CHAPTER I.

THE SUBJECT OUTLINED AND DEFINED.

1. **Crime defined.**—There are many different definitions of a crime, all, however, involving the same idea. Perhaps the following is as good a definition as any: A crime is any wrong either of commission or omission which the law regards as of sufficient gravity, or which the law regards as sufficiently injurious to the public, to punish in a proceeding in its own name.

What act, or omission to act, shall be stigmatized as a crime is purely a matter for the law-making power to determine. While it is true that most crimes are acts which are generally regarded as immoral, for example, murder, larceny, etc., many

* Professor of Law, University of Pennsylvania Law School. Author: "False Pretenses" in the Cyclopedia of Law and Procedure; "Life of Chief Justice Taney" in "Great American Lawyers." Editor: "Cases on Criminal Law," "Cases on Criminal Procedure." Contributor to legal journals and encyclopedias.

acts are made criminal which of themselves are not wrong. Thus, selling tobacco without a license, or without paying the revenue tax, is a crime, not because the law-making power regards the selling of tobacco as immoral, but because it desires to use the sale as a means of raising revenue, and the most effective way of enforcing the payment of the tax is to make the non-payment of it a crime.

Technically, a crime is distinguished from a tort by saying that a crime is a wrong against the public, and a tort is a wrong to a private individual.

In the early days of the law there seems to have been no distinction between a crime and a tort, or, to express it differently, all wrongs were recognized by law as being merely torts. If A stole from B, or struck or killed B, the state did not undertake of its own initiative to arrest A and punish him for his act, but left it to B or B's kin to seek redress. The wrong was regarded as a private matter between A and B. But gradually it was perceived that in the case of the graver wrongs at least it was not safe to leave it to the individual injured to seek redress, but that the welfare of society demanded that the state itself pursue the matter and of its own initiative mete out punishment to the wrongdoer. The cases in which the state thus acted were then differentiated from the ones in which it was still left to the initiative of the individual wronged to seek redress. The former were called crimes, and the reparation demanded by the state was called punishment. The law in thus deciding to take the initiative did not, however, take

away from the injured person the right to bring suit to recover pecuniary damages for the injury done him.

Many acts or omissions, however, which were still regarded as wrongs, the law did not consider of sufficient gravity to proceed against itself, but left it to the individual injured to seek redress in the courts. At present, if A trespass on B's land, while this is a wrong against B, the law does not regard it as of sufficient gravity to demand action—and therefore such trespass is a tort, but not a crime. If, however, A enter on B's land with force, and violently take possession thereof, this act is deemed sufficiently grave to warrant the state in proceeding against A and punishing him for a crime.

2. **Classification of crimes.**—Crimes are classified as treason, felonies, and misdemeanors. This classification, once of great importance in the administration of the criminal law, is now of lesser moment, and in some of our states has been abolished.

Treason. At the common law, treason was of two kinds: (1) high treason, (2) petit treason. High treason consisted of such crimes as especially affected the supreme executive power of the government. Blackstone mentions seven kinds of high treason, including acts varying in magnitude from rebellion to counterfeiting. In the United States the crime of high treason is, when directed against the federal government, declared in the Constitution of the United States to consist only "in levying war against them, or in adhering to their enemies, giving them

aid and comfort." Treason against a state is, by various state constitutions, confined within practically the same limits.[1]

Petit treason. Petit treason, at common law, consisted in the killing of a master by a servant, a husband by his wife, or an ecclesiastical superior by his ecclesiastical inferior. The crime of petit treason has been abolished in England, and never existed in the United States.

Felony. The term felony was applied at common law to the more serious crimes other than treason. It comprised every crime to which the forfeiture of the lands and goods of the felon was attached as part of the punishment.[2] In the United States the punishment of forfeiture is obsolete, and there is no single universal test to determine whether a crime is a felony. In some states felony has been defined by statute,[3] in others there is no general definition of the term, but the criminal code in defining the various crimes specifies the grade of the crime. If the statute do not specify the grade, and the crime were a felony at common law, it will be a felony. If it were not a felony at common law, or were not a crime at common law, and it be not made a felony by statute, it will be only a misdemeanor.

Misdemeanor. The term misdemeanor embraces all crimes less than felonies, such as assault, battery, libel, attempt, and the like. The punishment for

[1] Bishop, Criminal Law, § 456.

[2] 4 Blackstone, Commentaries, p. 94.

[3] In many states felony has been defined to be any crime punishable by death or by imprisonment in the state prison.

misdemeanors is usually a fine, or fine and imprisonment in the county jail.

3. **Sources of the criminal law.**—The statute law is the law enacted by the legislature of the state. Most of our states have enacted codes of criminal law, declaring certain acts crimes, and providing the punishment that shall be imposed for infractions of the code. Very few of these codes, however, do more than this, and, by themselves, they would furnish a very incomplete and inadequate system of criminal law.

The great body of criminal law in our states is derived from the common law of England. This is true not only in the sense that our definitions of the various crimes are borrowed from England but also in the sense that the general principles governing our criminal law, such as the effect of infancy, insanity, drunkenness, negligence, etc., have been imported into our law directly from the English common law.

This common law consists in those usages and customs of the English people which from time to time were recognized and given the effect of law by the decisions of the courts. When our ancestors emigrated to this country they brought with them this great body of law, or, at least, so much of it as was fitted to the new conditions in which they found themselves, and it continues to furnish the most important portion of our criminal law today.

To determine, therefore, whether an act is a crime the state statutes must be first consulted. If there the act is made unlawful it is unnecessary to look

further for authority to prosecute. If, however, there is no statute making the act done a crime, it should not be concluded from this silence that the act is not punishable. An examination should be made into the common law; if the act offends against the principles of that body of law it is a crime and indictable. Thus, it was held in Massachusetts that an indictment lay for libel, though there was no statute in that state declaring libel to be a punishable offense.[4] In a few states it has been held that no act is a crime unless forbidden by statute. The same is true as to crimes against the federal government.

As said by Chase, J., in United States v. Worrall:[5] "There is a power granted to Congress to create, define, and punish crimes and offenses, whenever they shall deem it necessary and proper by law so to do, for effectuating the objects of the government. * * * The question, however, does not arise about the power, but about the exercise of the power; whether the courts of the United States can punish a man for any act, before it is declared by a law of the United States to be criminal? Now, it appears to my mind to be as essential, that Congress should define the offenses to be tried, and apportion the punishment to be inflicted, as that they should erect courts to try the criminal, or to pronounce a sentence on conviction * * * it may be a defect in our political institutions, it may be

[4] Commonwealth v. Chapman et al., 13 Met. 68 (Mass.), LEADING ILLUSTRATIVE CASES.

[5] 2 Dall. 384 (U. S.).

an inconvenience in the administration of justice, that the common law authority relating to crimes and punishments, has not been conferred upon the government of the United States * * * but judges cannot remedy political imperfections, nor supply legislative omission."

In United States v. Hudson,[6] the same conclusion was reached.

[6] 7 Cranch 32 (U. S.), LEADING ILLUSTRATIVE CASES.

PART II

THE ELEMENTS OF CRIME

CHAPTER II.

THE ACT.

4. **Necessity for act.**—It is a general principle of law that every crime consists of two elements: (1) a physical element, usually called the "overt act"; (2) a mental element, known as the "mens rea" (evil intent).

Ordinarily when it is said that an act is necessary to constitute a crime, the word "act" is used in its usual signification. In a few cases, however, the term "act" has acquired a technical meaning. Thus, it is a crime in many jurisdictions to be in possession of certain articles, such as burglar's tools and counterfeit coin, with a criminal intent. In these cases, the being in possession of the enumerated articles is considered an "act."[7] So in the crime of conspiracy, the conspiring itself is the act, though nothing be done in pursuance of the conspiracy. The same thing is true in the crime of soliciting another to commit a crime—the mere solicitation is the act, though the person solicited refuses to do the act solicited.

[7] Rex v. Heath, Russ. & R. 183 (Eng.), LEADING ILLUSTRATIVE CASES.

Omissions. Some crimes consist in an omission to do some act required by law. This class of crimes must be regarded as an exception to the general rule requiring an act to constitute a crime; unless the result brought about by the omission be regarded as an act.

5. **Consent to the act by the person injured.**—In the law of torts a person cannot claim damages for the act of another to which he has consented. His consent is a bar to a civil action.

The same principle does not apply generally in criminal law. The reason for this is that a crime is regarded as an injury to the state, and is pursued and punished as such. Being an offense against the state, no individual, not even the one most directly injured, can give a consent to it; if he should consent, such consent would not shield the person committing the crime. Therefore, where A, in order to ply his trade of a beggar more successfully, persuaded B to cut off his (A's) hand, it was held, on an indictment of B for maiming A, that A's consent was no defense.[8] The same principle applies in duelling; if one of the parties is killed, the other is guilty of murder, though the deceased consented to be shot at, and himself shot at the other party.

6. **Same subject—Crimes requiring non-consent.**—While it is true that the consent of the injured party is no defense to a criminal charge, it must be remembered, however, that certain crimes require, by their very definition, the absence of consent on the part of the person against whom the act is

[8] Wright's Case, Co. Litt. 172a (Eng.).

directed. Rape is the carnal knowledge of a woman by force and without her consent; therefore, A cannot be convicted of the rape if B consented to the intercourse. The same rule applies in larceny; if the person from whom the goods are taken consents to the taking, no larceny is committed, for larceny requires that the goods be taken against the will of the owner. Other crimes which require for their commission the non-consent of the person against whom the act is directed are arson—if the owner of the house is in possession of the house burned—burglary and embezzlement. In assault and battery the consent of the person injured will take away the criminality of the act if the battery is a slight one,[9] but not if it cause serious bodily harm,[10] or amount to a breach of the peace.[11]

Distinction between consent and acquiescence. A distinction must be made between consent and acquiescence in those crimes where consent is a defense, such as larceny or burglary. While in this class of crimes consent is a good defense, the mere acquiescence of the party injured—his mere failure to take precautions against the commission of the crime—will not prevent the act of the accused in taking the property or breaking and entering the house from being a crime.

In Egginton's Case,[12] A asked B, a servant of C, to assist him in robbing C's house. B informed C,

[9] State v. Beck, 1 Hill 363 (S. C.). But see Commonwealth v. Collberg, 119 Mass. 350.

[10] See Regina v. Bradshaw, 14 Cox C. C. 83 (Eng.).

[11] Regina v. Coney, 8 Q. B. D. 534 (Eng.).

[12] 2 East, Pleas of the Crown, p. 666 (Eng.).

who told him to open the door when A came, that A might enter. A entered and took some money from the house. It was held that C consented to A's entering, since he ordered B to admit him, and that, therefore, A was not guilty of burglary, but that since C did not consent to A's taking the money, but merely gave him a greater facility to take it, A was guilty of larceny. The same principle was applied to the case of an indictment for inveigling a slave, the court holding that the fact that the owner knew of, and assented to, the slave's meeting the prisoner, was not such consent as would bar a prosecution.[13]

7. **Same subject—Consent obtained by fraud or threats.**—When it is said consent is a good defense to a prosecution for those crimes which require for their consummation the non-consent of the party injured, it must be understood that the consent spoken of may not be obtained by fraud. It is a general rule of law that fraud vitiates consent. If A, knowing that B wishes to enter A's house for the purpose of committing burglary, opens the door and invites B in, B, as we have seen, is not guilty of burglary, for A has consented to B's entry, knowing the purpose of B. If, however, B, intending to rob A, gains A's consent to his entry under the pretense that he wishes to see A on business, B is guilty of burglary. So where A, a physician, obtains the consent of B, a female patient, to strip her, on pretense that it is necessary for proper treatment of her, if the pretense is false, A is guilty of assault on B.

[13] State v. Covington, 2 Bailey 569 (S. C.), LEADING ILLUSTRATIVE CASES.

Consent obtained by threats. As in the case of consent obtained by fraud, so where consent is gained by threats, such consent is no consent. Therefore where A hands over his money to B under a threat by B to imprison him, such consent of A to parting with his property is no defense to B on an indictment for larceny.

Persons incapable of consent. Certain persons are incapable in law of giving consent to certain crimes. An insane person cannot give consent to carnal intercourse so as to bar a prosecution for rape, nor can a girl under the age fixed by statute. It has even been held that the consent of a boy of nine years to leave his mother—in whose custody he had been given by the court—to go away with his father, would not bar a prosecution of the father for false imprisonment of the son.[14]

8. **Guilt of the person injured as affecting act.**—Since it is the state that is conceived of as injured by a crime and not only the individual against whom the crime was directed, it follows that the fact that the individual injured was himself participating in the same or another crime at the time the crime was committed is no defense to the person indicted. Thus it is no defense in larceny to show that the person from whom the goods were taken had himself stolen them. In Regina v. ————,[15] the prisoner was indicted for passing counterfeit coin. The evidence showed that he had given the counterfeit coin to a woman with whom he had had illicit

[14] Commonwealth v. Nickerson, 5 Allen 518 (Mass.).
[15] 1 Cox C. C. 250 (Eng.).

intercourse, in payment to her therefor. The court held that the fact that the woman to whom the coin was given and who, it was alleged, was defrauded thereby, was herself guilty of a crime, for which she received the coin, did not affect the guilt of the prisoner.

Indeed there are some crimes, e. g., fornication, and adultery in some states, that are committed only when the act done is directed against another party who is himself participating in the crime.

In People v. Henssler,[16] the prisoner was indicted for obtaining the endorsement of one K to a promissory note. It appeared that the note was to be used to obtain money to be used for an immoral purpose, and that this was known to K when he endorsed it. It was contended for the prisoner that this evidence precluded a conviction. The court said: "This position is based upon the theory that the statute upon which this prosecution was founded was in some way intended to protect the party deceived or defrauded but not to punish the party guilty thereof. Where a crime has been committed the law seeks to punish the party guilty thereof. The injured individual has been wronged and his object, motive, or complicity therein may affect any remedy that he might have against the perpetrator thereof. In every crime there is in addition to this wrong done the individual, also a public wrong. This the state punishes, and except in certain trivial cases the person injured has no control over, and cannot prevent or interfere with the public prose-

[16] 48 Mich. 49.

cution by the state authorities. The fact that the party defrauded may have supposed or known the money obtained on his endorsement would be used for immoral or unlawful purposes, would not purge the guilt of the accused." This rule has been applied in many cases.

9. **Negligence of person injured as affecting act.** —In suits for civil wrongs, where one person has been injured by the negligent act of another, the contributory negligence of the person injured, if it helped to bring about the injury, is a partial or a complete defense. But since crimes are regarded as wrongs done to the state rather than to the particular individual injured, the act of negligence is none the less criminal because of negligence in the person injured contributing to the result. This principle is clearly brought out in the case of Regina v. Longbottom.[17] Longbottom was indicted for manslaughter in causing the death of B. It was proved on the trial that the prisoner, while partially intoxicated, drove rapidly down a hill on a road thickly shaded with trees, and ran over and killed B. B had been deaf from childhood, but had a habit of walking at all hours in the middle of the road, though he had frequently been warned of the danger of so doing. It appeared that he had been walking in the middle of the road on this occasion. It was held that the negligence of the deceased did not affect the criminality of the act of the accused. The court said: "There is no balance of blame in charges of felony; * * * the prisoner must be found guilty on this

[17] 3 Cox C. C. 439 (Eng.).

indictment, whatever may have been the negligence of the deceased himself."

10. **Condonation of the person injured as affecting act.**—A crime being an offense against the state, no individual, not even the one directly injured by the crime, can, by his condonation, absolve the offender from the consequences of his act. This was a universal rule of the common law at a certain period. In State v. Tull,[18] the prisoner was indicted for forgery. It was proved that he had forged his mother's name to a promissory note. The mother testified that she had paid the note, had forgiven the prisoner, and did not wish him to be prosecuted. The court held that this evidence was immaterial to the guilt and punishability of the accused. In modern times, however, there is a tendency to allow condonation in the case of certain crimes.

Statutes in some states now provide for the condonation and settlement of minor offenses by voluntary agreement of the parties themselves. Where such statutes are in force the common law rule above given is, of course, abrogated.

11. **Custom, as affecting act.**—That it has been, or is, the custom to do certain acts is not a defense, if the acts done are forbidden by law and the other elements of crime are present. Thus it is no answer to a charge of larceny of a load of wood, to show that it was the custom of the people in the locality to go to a certain place and take wood belonging to others.[19] Nor is it an answer to a charge of riot in

[18] 119 Mo. 421.
[19] Vick v. State, 69 S. W. 156 (Tex.).

giving a charivari, that the defendants were but acting in accordance with the custom of the country.[20]

12. **Coercion, as affecting act—In general.**—If one be compelled to the doing of an act to the extent that the act is not his, he is not responsible for such act. If A take the hand of B in which there is an open knife and by superior force drive the knife into C, this is the act of A, not of B, and B is not liable for the consequences. Where, however, A threatened to kill B unless B killed C, and B did kill C, this was held B's act and he was adjudged responsible therefor, for a choice was given him and he must rather die himself than take the life of an innocent person.[21] But threats of death will excuse the commission of treason. And threats of bodily harm will excuse the commission of many crimes of smaller magnitude, such as destruction of goods.

Necessity. Necessity is said by the earlier writers on the criminal law to be a defense to an act that would be otherwise criminal. Thus Bacon says:[22]

"If divers be in danger of drowning * * * and one of them get to some plank * * * and another to save himself, thrust him from it, whereby he is drowned, this is * * * justifiable." But this is denied by later writers, and would seem to be no more excusable than the killing of another under threat of death from a third person. And it has been held that a party of shipwrecked sailors were not justified in killing one of their number

[20] Bankus v. State, 4 Ind. 114.
[21] Arp v. State, 97 Ala. 5, LEADING ILLUSTRATIVE CASES.
[22] Bacon, Maxims, No. 5.

though it appeared to be the only way of saving their lives.[23] Where the gist of the crime, however, is an omission to do some act, the impossibility of doing the act has been held to be a justification.[24]

Command. The mere command of another will never justify the commission of an unlawful act even though the person giving the command occupy a position of authority over the actor. Since a soldier is bound under severe penalties to obey the lawful orders of his superior, he is excused for obeying even an unlawful command, if the order appear on its face to be lawful.[25]

Coverture. Due to the authority exercised by a husband over his wife in the days of the early common law, it was presumed that an unlawful act done by the wife in her husband's presence was done under coercion from him, and he alone was liable. This presumption still obtains in the law though there is now little but authority on which to base it.[26]

If, however, it be shown that she in fact was not acting under his coercion but of her own will, she is herself liable.

Some writers except from the operation of this rule the crimes of treason, murder, manslaughter, robbery, keeping a gaming house or a bawdy house. In the commission of these crimes no presumption of coercion arises.[27]

[23] Regina v. Dudley, 15 Cox C. C. 624 (Eng.).
[24] Regina v. Bamber, 5 Q. B. 279 (Eng.).
[25] Riggs v. State, 3 Cold. 185 (Tenn.).
[26] Commonwealth v. Neal, 10 Mass. 152, LEADING ILLUSTRATIVE CASES.
[27] See Russell, Criminal Law (7th Eng. ed.), p. 96.

CHAPTER III.

THE INTENT.

13. **In general.**—Aside from certain minor statutory offenses, the law does not punish an act unless it is accompanied by a state of mind called the *mens rea* (guilty mind). In the case of most crimes this "guilty mind" consists in a criminal intent. It is not larceny to take property belonging to another unless it is done with the guilty intent to deprive the owner permanently of the property taken. Therefore, if A takes B's property as a joke, intending to return it to B, A is not guilty of larceny though the property be destroyed while in his possession and A be totally deprived of it. Nor is A guilty of obtaining property by false pretense or misrepresentation from B, though he obtained it by a pretense that was in fact false, if he himself thought the representation true.

14. **Intent in statutory crimes.**—While, as has been said, it is a general principle of the criminal law that an evil intent is a necessary element in a crime, it is within the power of the legislature to declare an act to be criminal though done without any evil intent. In the case of many minor statutory crimes this has been done. In prosecutions under a statute making it a misdemeanor to "sell adulterated milk" it was held that the penalty was incurred though the sale was made without any knowl-

edge of the adulteration, the seller having bought the milk for pure milk.[28] On the same ground it has been held that a statute making it bigamy for any person to marry while such person has a wife or husband living, was violated, though at the time of the second marriage the defendant honestly believed that the first spouse was dead.[29] So it has been held that the keeper of a hotel may be convicted for the violation of a statute in not keeping the bar closed on Sunday, though he had no intent to violate the same.[30]

There is no absolute test that will determine whether in a given case of statutory crime an intent is or is not necessary. It depends in each case on the intention of the legislature. As said by the court in Halsted v. State:[31] "Each of this set of cases is, or should have been, the result of the judicial ascertainment of the mind of the legislature in the given instance." The legislature is competent to declare any act criminal irrespective of the knowledge or intent of the doer of the act. In the case of statutory crimes, therefore, the entire function of the court is to find out the intention of the legislature, and to enforce the law according to such intention. In such cases there are two considerations influencing the minds of the judges, one, the seeming injustice of punishing unconscious violations of law, and the other the necessity, on account of the difficulty of proving intent in a certain class of cases, of not

[28] Commonwealth v. Farren, 9 Allen 489 (Mass.).
[29] Commonwealth v. Mash, 7 Metc. 472 (Mass.).
[30] People v. Roby, 52 Mich. 577, LEADING ILLUSTRATIVE CASES.
[31] 41 N. J. L. 552.

requiring such proof, but punishing on mere proof of the act done.

15. **Negligence as constituting intent.**—The mens rea (evil intent) is, in the case of some crimes, found in the negligence with which an act, otherwise lawful, is done, or in negligence in omitting to do an act which the party should have done. A drives at a reckless rate of speed on a public highway and runs over and kills B, a pedestrian. A is guilty of manslaughter. A has the right to drive in the highway, but having caused B's death by his negligence in the manner of doing it, he is responsible for B's death. So in cases of negligently omitting to do some act that it was one's legal duty to do. Thus where A, a switchman, negligently omitted to set a switch, thereby causing an approaching train to be wrecked, thus causing the death of B, a passenger, A is guilty of the manslaughter of B. Negligence as constituting mens rea is not confined to cases of homicide. One may be guilty of a misdemeanor in neglecting to repair a bridge, in neglecting to obey an order of a magistrate, or in any case where the law imposes on one a duty to act and the person on whom the duty is imposed neglects to perform the duty.

In some cases negligence is said to supply the intent necessary to a crime. This is the case in involuntary manslaughter, the definition of which is causing the death of a human being by criminal negligence. If a person drives negligently on a road and runs over and kills a pedestrian, he is guilty of manslaughter, the negligence supplying the intent.[32]

[32] See sections on manslaughter in Chap. XVII.

16. **Constructive intent.**—Some crimes do not require a specific intent. In the case of these crimes a general evil intent is sufficient, and this intent may be found by proof that the defendant was, at the time he did the act for which he is indicted, engaged in the commission of another crime. Thus if A, while engaged in robbing B, accidently kills B, he is guilty of murder though he had no intent to kill B; the intent to commit the robbery being carried over to the act of killing. In Isham v. State,[33] A, a slave, was indicted for the manslaughter of B, a white man. A statute made it a greater offense for a slave to kill a white man than to kill another slave. B was disguised as a slave when he was killed by A. It was held that A was guilty of the greater offense of killing a white man, though A killed B thinking him a runaway slave.

These cases are not an exception to the general principle that intent is necessary to a crime; the intent is said to be carried over from the intent to do the crime which the accused was engaged in doing when he did the crime for which he is prosecuted. In order for this principle of constructive intent to operate, however, the act that the accused was doing when the unintended result happened must have been one which was malum in se (wrong in itself), and not an act that was merely a civil wrong, or wrong merely because forbidden by statute. Thus in Commonwealth v. Adams,[34] A was indicted for assault and battery on B by running into B with a

[33] 38 Ala. 213.

[34] 114 Mass. 323, LEADING ILLUSTRATIVE CASES.

sleigh. There was no intent on A's part to strike B, but as A was driving at a rate of speed forbidden by a city ordinance, it was contended that the intent to disobey the ordinance could be carried over to the striking of B. This was denied by the court, since as it was not shown that A was driving recklessly he was, at most, engaged in an act which was wrong merely because forbidden by statute, and not an act wrong in itself. The same principle has been applied where A threw from a wharf a box belonging to B which struck C, who was swimming near, and killed him.[35]

By analogy to this principle, if A shoots at B intending to kill B, but accidentally kills C, he is guilty of the murder of C. If, however, in this case, A's bullet had barely missed C, and A were indicted for an attempt to kill C, he could not be convicted; for the crime of attempt requires specific intent, and here A had no specific intent to kill C.[36]

17. **Specific intent.**—When it is said that act and intent are essential elements of crime, it is not meant that any unlawful act done with any evil intent necessarily makes the doer guilty of a crime. On the contrary, the definitions of most crimes require that the physical element of the crime—the act—be done with a certain specific intent, or that particular crime is not committed. There is no such thing as a general criminal intent. Thus the crime of larceny requires an intent to steal; rape, the intent to have forcible connection with a woman without her con-

[35] Regina v. Franklin, 15 Cox C. C. 163 (Eng.).
[36] See Rex v. Holt, 7 C. & P. 519 (Eng.).

sent; burglary is the breaking and entering of a dwelling with intent to commit felony; and unless the appropriate intent is proved in each case the accused cannot be convicted. Thus where A took B's clothes from her for the purpose of inducing her to meet him so that he might have sexual intercourse with her, though his intent was evil—to have sexual intercourse—it was held that he was not guilty of larceny of the clothes because he did not intend to steal them.[37] Likewise if A should break and enter the house of B with evil intent of committing adultery with B's wife, this would be burglary in those states where adultery is a felony, but not in other states, where adultery is only a misdemeanor; for burglary requires the specific intent to commit a felony.

There is also a large class of acts the punishment for which has been by statute graduated according to the intent with which they are done. Thus we have assault and battery with intent "to wound," with intent "to do grievous bodily harm," with intent "to rape" and with intent "to kill." On an indictment for any one of these specific crimes the appropriate specific intent must be proved or the defendant cannot be convicted. If an indictment under one of these statutes specifies the intent with which the act was done, that particular intent must be proved or the defendant cannot be convicted on that indictment. Thus if the defendant is indicted for assault and battery with intent to kill, and the proof shows that he did not commit the battery with

[37] Rex v. Dickenson, Russ. & R. 401 (Eng.).

intent to kill, but only with intent to wound, he cannot be convicted on that indictment, though assault and battery with intent to wound only, is also a crime.

In Rex v. Kelly,[38] Kelly was indicted for maliciously killing a horse. The proof showed that the prisoner had in fact fired at the person riding on the horse but had missed him and killed the horse. The court said: "Under this act the offense must be proved to have been done maliciously, and malice implies intention. Here the proof negatives the intention of killing the horse. The prisoner must therefore be acquitted."

If, however, A be indicted for assault with intent to kill B, and it be proven that he did in fact stab and seriously wound B, he is not exonerated by proving that the blow was given in the dark, he mistaking B for X whom he intended to kill, for as he intended to kill the person before him and that person was B, the charge is proven.[39]

18. **Concurrence of act and intent.**—Not only must there be, to constitute a crime, both act and intent, but the act and intent must concur in point of time, or no crime is committed. If a person does an act without the evil intent required to make that act a crime, he is not guilty of the crime if the intent subsequently comes to him. Thus if A find a trunk and take possession of it, but later, and while it is still in his possession, form the intent to convert it to his own use, he is not guilty of larceny since the

[38] 1 Craw. & D. 186 (Irish).
[39] McGehee v. State, 62 Miss. 722, LEADING ILLUSTRATIVE CASES.

act of taking and the criminal intent did not concur in point of time. So also if one first have the intent to do an act and subsequently do the act, but only after the intent had been abandoned, he would not be guilty of the crime. Thus if A had formed the intent to kill B, but later changed his mind, and then killed B by accident, he would not be guilty of the murder of B, because, though there had been both act and intent, they did not concur in point of time. As said by the court in Pinkard v. State,[40] "The law as well as the gospel allows a place of repentance, and notwithstanding the accused may at one time have agreed to engage in the crime, yet if he afterwards changed his mind, and abandoned that intention, he is not guilty."

19. **Concurrence of several intents.**—While, as a rule, a person is not punishable for an act done unless he also had an evil intent, he may be convicted though the intent necessary to constitute the crime with which he is charged was not his principal intent at the time he did the act. If A is charged with striking B with a pick-axe, with intent to wound B, it is no defense for A to say his intent was to kill B; for though his main intent was to kill, as he could not kill with the weapon he used without also wounding, he must have had the intent also to wound, and this is sufficient though it was not his principal intent. In Rex v. Gillow,[41] the prisoner was indicted for shooting B, with intent to do B some grievous bodily harm. It appeared that the

[40] 30 Ga. 757.
[41] 1 Moo. C. Cas. 85 (Eng.).

prisoner was caught poaching by three game-keepers, of whom B was one, and that as the keepers sprang forward to seize him he fired his gun at B, giving him a slight wound. The jury found that the prisoner's motive was to prevent his arrest, but that in order to effect that purpose he had also the intention of doing B grievous bodily harm. It was objected that as there was a separate crime, by statute, of shooting with intent to prevent arrest, and the jury had found that to be his principal intent, he could not be convicted under the statute on which he had been indicted, making it a crime to shoot with intent to do grievous bodily harm. But the court held that if both intents existed it was immaterial which was the principal and which the subordinate one.

20. **Intent distinguished from motive.**—Intent must be distinguished from motive. "Intent is, in its legal sense, the purpose to use a particular means to effect a certain result. Motive is the reason which leads the mind to desire that result."[42] Intent is an essential element in a crime, motive is not. If a person had the requisite intent required by law to constitute the mental element in a given crime and did the act, it is immaterial what his motive was, or whether it was good or bad. Thus it is no defense to an indictment for the murder of a child, to prove that the defendant killed the child to prevent its being a burden on its m[redacted] Nor is it a defense to an indictment for biga[redacted] that the defendant married the second wife because plural marriages were

[42] Dodge, J., in Baker v. State, 97 N. W. 566 (Wis.).

enjoined on him by his religion.[43] In Respublica v. Caldwell,[44] the prisoner was indicted for a nuisance in erecting a wharf on public property. In defense the prisoner offered to prove that the erection of the wharf, while on public property, had been beneficial and not hurtful to the public. The court held this to be no justification. On the same principle it was held no defense to an indictment for the publication of obscene matter, that the publisher believed such publication necessary to educate the public as to sexual matters.[45]

[43] Reynolds v. United States, 98 U. S. 145.
[44] 1 Dall. 150 (Pa.).
[45] United States v. Harmon, 45 Fed. 414, LEADING ILLUSTRATIVE CASES.

CHAPTER IV.

INTENT AS AFFECTED BY CONDITIONS.

21. **Ignorance or mistake of law.**—*Ignorantia legis neminem excusat* (ignorance of the law excuses no one) is an ancient maxim of the criminal law. It is said that this rule lies at the foundation of the administration of justice. And there is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment that would be introduced into every trial by conflicting evidence upon the question of ignorance. If a foreigner do an act which is lawful by the law of his own country but is a crime by the law of the place where he does the act, he is not excused though he is ignorant of that law. Indeed, so rigidly is this doctrine adhered to by the courts, that it has been held that ignorance of the law will not excuse though the defendant could not possibly have known the law under which he was indicted; as where he was at sea at the time the law was enacted. As ignorance of the existence of the law is no excuse, so a mistaken belief that a law is unconstitutional, or that one has the right under the law to do a certain act, is no defense; and it is immaterial that one sought competent advice as to the legality of his act before acting.

In crimes requiring a specific mental condition, the fact that the defendant was ignorant of the law will

sometimes be held an excuse, but only where his ignorance is such as to show that the mental condition required to constitute the crime with which he is charged, was not present; he is not excused because of his ignorance of law, but because of lack of one of the elements of the crime. Thus in an indictment for larceny, if the defendant believed the property taken to be his own property, he cannot be convicted, though his belief that it was his own was due to ignorance of law.

22. **Ignorance or mistake of fact.**—As has been seen, there is, as a general proposition, no crime without an evil intent. This being so, if one, under the belief that certain facts exist, does some act which would be lawful if the facts were as he supposed them to be, he commits no crime, because he had no intent to do wrong.[46] Thus where one was indicted for passing a forged certificate of deposit, it was held that if he was ignorant of the fact that the certificate was a forged one, he could not be convicted, though the statute making the act a crime said nothing about such knowledge.[47]

The mistake or ignorance of fact must, however, to be an excuse, in general, be a bona fide (in good faith) mistake, and such as a reasonable person would make. A person should not be allowed to do an act he is in no way bound by law to do, which may or may not be criminal, depending on the surrounding facts or circumstances, without reasonably investigating the facts, and then to claim that his

[46] Gordon v. State, 52 Ala. 308, LEADING ILLUSTRATIVE CASES.
[47] Anderson v. State, 7 Ohio 250.

ignorance of the existing facts should excuse him. In case of crimes requiring proof of a specific intent for conviction it would seem, however, that, no matter how unreasonable the belief, if it had been bona fide (in good faith) entertained, the defendant is excused. It is essential to convict of the crime of larceny that it be proved that the accused took the property with the intent to deprive the owner of it. If, therefore, a person, under the belief that certain property is his own, takes it, he cannot be convicted of stealing it, no matter how unreasonable his belief may have been.

23. **Infancy.**—A child under seven years of age is conclusively presumed to be incapable of committing a crime. He may commit a tort, but he cannot be punished criminally, since he has not capacity to commit a crime. Nor is it permissible to show that the particular child in question is precocious, and therefore punishable. A child under seven years of age may not be convicted even on his own confession. Between the ages of seven and fourteen a child is presumptively incapable of committing crime. That is, while the presumption is that he is incapable, yet evidence may be admitted to show that the nature of the act was understood by him, and that he is therefore capable. The burden is on the state to establish the fact of capacity in such cases.[48] After fourteen years of age, capacity is presumed, and cannot be disputed on the ground of infancy. There are crimes which an infant under a certain age is conclusively presumed to be incapable of committing by

[48] Angelo v. People, 96 Ill. 209, LEADING ILLUSTRATIVE CASES.

reason of the nature of the crime, rather than by reason of his age. Thus a male under fourteen years is held to be incapable of committing rape. In a few courts this presumption is allowed to be rebutted by evidence that the accused has arrived at the age of puberty.

24. **Insanity.**—Since a guilty mind is necessary to criminality, an insane person is not criminally responsible for his acts. Insanity is, in the criminal law, any disease of the mind rendering it incapable of entertaining, or preventing its entertaining in the particular instance, the criminal intent which constitutes one of the elements of any crime.[49] The term "insanity" is used in law to cover several forms of mental incapacity such as idiocy, lunacy, monomania, and the like. Insanity may be general—when a person is insane on all subjects; or partial—when he is insane on certain subjects only. It may also be permanent or only temporary, or intermittent. When a person is insane on all subjects he is not criminally responsible for his actions, though he may have glimmerings of reason. Partial insanity is where a person is insane on one or more subjects but otherwise is sane. In the case of partial insanity the insane person is not responsible for those acts which are the product of his diseased mind; but for acts to which he was not instigated by his madness he is as responsible as any other person. Thus while a kleptomaniac should not be held responsible for larceny, his mental state should

[49] See for a discussion of insanity, Guiteau's Case, 10 Fed. 161, LEADING ILLUSTRATIVE CASES.

not be held a good defense to an indictment for murder. When a person is temporarily or intermittently insane, while he is not responsible for his acts done when the fits of insanity are upon him, he is responsible for those acts done by him either during a lucid interval or after the disease has left him.

25. **Same subject—Delusions.**—When a person is suffering from an insane delusion it would seem that he should not be responsible for any act which was the product of the delusion. In a leading case[50] on this subject, however, the English judges made a distinction which has been generally followed both in England and in this country. The judges said: "He [the person laboring under the delusion] must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment, because, in such case, if the facts were as he supposed them to be he would be justified. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." In the latter case he would not be justified in killing if the facts had been as he supposed.

Tests of insanity. Various tests to determine whether a man is insane so as not to be responsible for his acts have been proposed. The one most gen-

[50] McNaghten's Case, 10 C. & F. 200 (Eng.).

erally accepted by the courts is the one laid down by the judges in McNaghten's Case, just cited, and known as the "right and wrong test." According to this test the accused is responsible unless "at the time of committing the act he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that he was doing what was wrong."

26. **Same subject—Irresistible impulse.**—While most American courts have adopted the "right and wrong test," some hold that it is not the only test, and have recognized a form of insanity in which the accused may know the difference between right and wrong and yet not be responsible for his acts. In this form of insanity, though the accused knows he is doing wrong, he is unable, through disease of the mind, to choose the right, and is driven by an "irresistible impulse" to do the wrong. This form of insanity usually manifests itself as a homicidal mania, and has been recognized by many courts as rendering the person afflicted with it irresponsible. Others, and the greater number of courts, refuse to recognize this form of insanity as a defense. A few courts hold that there is no legal test of insanity, holding that whether the accused was so insane as not to be responsible for his act is a question of fact for the jury to decide in each particular case on all the evidence before them.

Kleptomania. Kleptomania is an irresistible impulse to steal. Therefore it should be a defense in those jurisdictions where irresistible impulse is rec-

ognized, and not a defense where the "right and wrong test" prevails.

27. **Same subject—Burden of proof.**—The courts differ even more as to the burden of proof in cases where insanity is pleaded as a defense than they do as to the proper test of insanity. Some courts hold that since every man is presumed to be sane, the burden of proving that he was insane when he did the act for which he is indicted is on him, and if the jury, after all the evidence is in, are in doubt as to whether he was insane, they should convict. Other courts hold that since the burden of proving every element of the crime is on the state, and since intent is one of the elements of crime, and since the plea of insanity is merely a denial of intent, the burden of proving that the accused was sane is on the state.[51] Those courts that hold that the burden of proof is on the prisoner, differ among themselves as to the weight of the evidence necessary to overcome the presumption of sanity. Some hold that the prisoner should be convicted unless he prove "beyond a reasonable doubt" that he is insane.[52] Others hold that the jury must be "satisfied" of his insanity, but not beyond a reasonable doubt.[53]

28. **Intoxication.**—As a general rule voluntary intoxication, no matter how great the degree, is not a defense to a charge of crime. It was formerly said that it aggravated the offense, but this idea is now exploded. Blackstone gives as the reason why intox-

[51] Cunningham v. State, 56 Miss. 269.
[52] State v. DeRance, 34 La. Ann. 186.
[53] People v. Kilpatrick, 204 Pa. 218.

ication is not admitted as a defense, that our law "considering how easy it is to counterfeit this excuse, and how weak an excuse it is, will not suffer any man thus to privilege one crime by another."[54] It is the last idea expressed by Blackstone rather than the first that has led to the rule that drunkenness is not a defense. "The law has always looked upon voluntary drunkenness as, at least, quasi criminal, a step toward the wrong, if not the wrong itself."[55] The accused, having voluntarily brought about a condition which he should know would at least render the commission of the crime probable, cannot claim any advantage from his own wrong. Therefore intoxication is neither a defense to a charge of murder, nor even such an extenuation as to reduce the killing to manslaughter.[56]

Involuntary drunkenness. The reason of the rule that voluntary drunkenness is no excuse for crime being that the defendant was in fault in bringing about his condition, it follows that if drunkenness was not voluntary—as where it was brought about through the strategy or fraud of another, or through the negligence of a physician—and was so great as to render the drinker incapable of knowing what he was doing, he is not responsible for acts done in that state.

Delirium tremens. While drunkenness, no matter what the degree, is ordinarily no defense, yet, if drunkenness bring about a condition of insanity,

[54] 4 Blackstone, Commentaries, p. 26; see Pigman v. State, 14 Ohio 555, LEADING ILLUSTRATIVE CASES.

[55] 1 Bishop, Criminal Law, § 399.

[56] 1 Hale, Pleas of the Crown, p. 32 (Eng.).

e. g., delirium tremens, the defendant is no more responsible for his acts than he is in any other case of insanity.[57] As said by Story, J., in United States v. Drew,[58] "Many species of insanity arise remotely from what, in a moral view, is criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence."

29. **Same subject—As affecting specific intent.**—We have seen that certain crimes require for their commission a specific intent, and that anything that goes to negative such intent—even ignorance of law—is admissible as a defense. It follows from this that in this class of crimes drunkenness, if it is so great as to show that the defendant could not have entertained the specific intent which is a necessary element in the crime with which he is charged, is a good defense.

This is well shown in the case of murder. Murder at common law did not require a specific intent to kill, a general malevolent intent was sufficient. Therefore on an indictment for murder at common law drunkenness was no defense. Many of our statutes now divide murder into degrees requiring for murder in the first degree a specific intent to kill. On an indictment under such a statute the defendant cannot be convicted of murder in the first degree if he was so drunk at the time of the killing as not to be able to entertain the specific intent required.[59]

[57] State v. Haab, 105 La. Ann. 230.

[58] 5 Mason 28 (U. S.).

[59] Keenan v. Commonwealth, 44 Pa. 55.

The same principle applies in larceny,[60] passing counterfeit money,[61] and other crimes requiring specific intent. Of course in these cases, if the defendant though drunk is not too drunk to entertain the required intent, his condition is no defense. If, however, even in these cases, the defendant form the necessary specific intent before becoming intoxicated, and then make himself drunk, and then commit the act, the original intent is said to continue through the intermediate period, and he is responsible for the crime.[62] It is said, also, in some cases, that drunkenness may be taken into consideration where the person who has been injured or killed was the aggressor, for the purpose of ascertaining whether the act of the prisoner was done under a bona fide (good faith) apprehension that his person or property was about to be attacked.[63]

30. **Incorporation.**—Under the early common law it was said that a corporation could not be indicted for a crime, though its members might. It is now held that in the case of certain crimes a corporation is liable to indictment the same as an individual. It cannot be guilty of bigamy, perjury, rape or murder, it is true, for these crimes require a "guilty mind," and, by their very nature, can only be committed by an individual. But in many crimes, where the only intent required is an intent to do a prohibited act or to omit to perform a required duty, a corporation

[60] People v. Walker, 38 Mich. 156.

[61] 4 Blackstone, Commentaries, p. 26; Pigman v. State, 14 Ohio 555, LEADING ILLUSTRATIVE CASES.

[62] State v. Robinson, 20 W. Va. 713.

[63] Marshall's Case, 1 Lew. C. C. 76 (Eng.); Rex v. Thomas, 7 C. & P. 817 (Eng.).

may be convicted of such crime when, in its corporate capacity, and by direction of those controlling its corporate action, it does the prohibited act. In such a case the intention of its directors that the prohibited act be done is imputed to the corporation itself. Thus a corporation may be indicted for working its employees more than a prescribed number of hours per day,[64] for nuisance,[65] and for contempt of court.[66] In some states it is held that while corporations can be indicted for nonfeasance, or omission to perform a legal duty, they cannot be indicted for acts of malfeasance, or the doing of a wrongful act.[67] But the tendency of the more recent cases is to hold them liable for acts of malfeasance as well as of nonfeasance.[68]

[64] United States v. John Kelso Co., 86 Fed. 304.

[65] North Cent. Ry. Co. v. Commonwealth, 90 Pa. 300.

[66] Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294.

[67] State v. Ohio & Miss. R. R., 23 Ind. 362.

[68] Commonwealth v. Pulaski County Agricultural and Mechanical Association, 92 Ky. 197, 17 S. W. 442, LEADING ILLUSTRATIVE CASES.

CHAPTER V.

JUSTIFICATION.

31. **Public justice.**—In order to insure public justice and authority the law makes it the duty of certain public officers, and the right, if not the duty, of private persons, to do certain acts in enforcement of the laws which if done under other circumstances would be crimes. It is the duty of the sheriff to hang a man lawfully condemned to death, of a policeman or constable to make arrests in certain cases, of a jailer to confine prisoners; hence these acts, thus done, do not render the doer guilty of homicide, assault and battery, or false imprisonment. Likewise, the law gives a private person the right to arrest a person committing a breach of the peace in his presence, or one who has committed a felony, even though not done in his presence, and justifies the force necessary to effect the arrest.

32. **Same subject—Force used.**—The law makes a difference in the amount of force justifiable, depending on the gravity of the crime for which the arrest is being made. If the crime for which the arrest is being made is one of the more serious felonies, the person making the arrest, whether he be an officer or a private person, may use all force necessary to effect the arrest, even to the taking of the life of the felon. If, however, the crime be only a misdemeanor, or one of the lesser felonies, the per-

son attempting to arrest can use only such force as is necessary to make the arrest, short of killing. He must rather suffer the criminal to escape than take his life.[69] If unnecessary or excessive force be used in effecting the arrest, the person making the arrest is criminally liable for such excess, for murder if he kill deliberately, for manslaughter if in heat of blood, for a battery if death do not result.

33. **Prevention of crime.**—Lord Coke states the broad doctrine to be that a person about to commit any felony may be killed. Blackstone, who wrote later, says: "Where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting." The reason given by him for restricting the rule laid down by Coke is, that the law is too tender of the public peace and too careful of the lives of the subjects to "suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death." The later doctrine more narrowly confines the right to kill to prevent the commission of a crime, in some cases, and broadens it in others. It is no longer held, as laid down by Coke, that one may kill to prevent any felony, but neither is it true that one about to perpetrate a crime can be killed only if the crime about to be perpetrated by him is punishable by death. The better modern rule is that any one, officer or private person, is justified in using force to prevent the commission of a crime. If the crime attempted is one of the graver felonies, such as murder, burglary or rob-

[69] Reneau v. State, 2 Lea 720 (Tenn.), LEADING ILLUSTRATIVE CASES.

bery, he may even kill, if killing is necessary to prevent the crime. If the crime attempted is a misdemeanor or one of the lesser felonies, not accompanied with force, such as petty larceny, only such force, short of killing, as may be necessary to prevent the crime may be used.[70]

34. **Domestic authority.**—The law invests a parent, or one standing *in loco parentis* (in the place of a parent), with power to use a reasonable amount of force when necessary for correction. The force used must be reasonable under the circumstances, however, and if an instrument not fit for correction is used, or excessive force is employed, or the parent acts from malicious motives, the parent is criminally liable. Thus where a master struck his apprentice with an iron bar, causing his death, it was ruled murder.[71] This right of correction has been held to inhere in parents; in teachers;[72] in stepfathers;[73] and in the master of an apprentice.[74] It is said by Blackstone that a husband has a right to chastise his wife; but this is now denied. In State v. Oliver,[75] the defendant was indicted for assault and battery on his wife, and convicted. The court, in affirming the conviction, said: "We may assume that the old doctrine, that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed the

[70] Storey v. State, 71 Ala. 329.
[71] Grey's Case, Kel. 64 (Eng.).
[72] Commonwealth v. Seed, 5 Clark 78 (Pa.).
[73] State v. Alford, 68 N. C. 322.
[74] State v. Dickerson, 98 N. C. 708.
[75] 70 N. C. 60.

courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife, under any circumstances. But from motives of public policy—in order to preserve the sanctity of the domestic circle—the courts will not listen to trivial complaints. If no permanent injury is inflicted, nor malice, cruelty, or dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive. No general rule can be applied, but each case must depend upon the circumstances surrounding it."

35. **Defense of property.**—Some acts, otherwise criminal, are justified when done in defense of one's property. Thus one may use force to prevent one's property from being damaged or one's house from being entered. The amount of force which is justifiable depends on the circumstances of the case. The general rule is that such force may be used, short of taking life, as is necessary for the protection of the property. Thus, though A is justified in using force to eject an intruder from his house, when A, in so doing, kicked the intruder, thus causing his death, it was held that A was guilty of manslaughter.[76] It is sometimes said that "a man's house is his castle," and that an attack on a man's house is an attack on his person. This is true only when the attack on the house is made for the purpose of injuring an occupant of the house.[77] The right of an occupant in such a case is a right of self-defense, not a right of

[76] Wild's Case, 2 Lew. C. C. 214 (Eng.).
[77] State v. Patterson, 45 Vt. 308.

defense of property. Where the attack is only on the house or premises, the right of defense is no greater than in any other case of defense of property, and the occupant can use only such force in repelling the attack as is allowed in such cases.

Where one is threatened with death unless he will give up his property, he need not retreat and relinquish the property; he may stand his ground and defend his possession, and if in such defense his life is put in danger by his assailant, he may kill in self-defense, not to protect his property, but to save his life. As one may use force to defend possession of property, so he is justified in using force to recover the possession of property which has been taken from him. How much force he may use is not entirely clear from the authorities. As indicated, one may not kill to prevent even a felony, like larceny, committed without force. It would seem that if one may not kill to prevent his property being stolen, he may not kill to recover such property after the thief has taken possession of it. It is true, however, that where a felony, like larceny, has been committed, any person—therefore the owner of the property stolen—may pursue the thief for the purpose of arresting him, and of recapturing the stolen property. He may use such force as is necessary to effect the arrest, or to regain the stolen property, short of killing, undoubtedly. It is also true that if resisted in making the arrest or in recapturing the property, he may oppose force with force, and if in the struggle the party making resistance is either accidentally killed or is killed in self-defense, the person killing

is excused. This it seems is the extent of the right to use force in such cases.

36. **Self-defense.**—The law, recognizing the right of self-preservation, gives a person the right to defend himself even to the point of taking the life of his assailant, if necessary. In this, as in all other cases, however, the law does not countenance the needless taking of life, therefore the danger must be imminent and real or such as would appear to a reasonable man to be real to justify a killing in self-defense.

Imminence of the danger. One may not plead self-defense where the danger of attack is not immediate. If A should threaten to kill B on sight, B would not be justified either in seeking A out and killing him, or in killing him on a chance meeting when his life was not in danger, in order to prevent A from killing him at some future time, for a killing is only justified by necessity.[78]

Extent of right. The extent to which one may go in self-defense depends on the extent of the injury threatened. The general rule is that one may use so much force in defending his person from injury as is necessary to avert the injury threatened, and no more. If A attack B with his fists, there being no great physical disparity between them, B is not justified in stabbing A, for such defense is disproportioned to the attack. But if the attack by A, because of the amount of force used, or the character of the weapon, puts B in danger either of death or serious bodily harm, B may even take A's life in self-de-

[78] Stoneman v. Commonwealth, 25 Gratt. 887 (Va.).

fense.[79] As a man may kill in defense of his life, so a woman may kill, if necessary, in defense of her chastity.[80]

37. **Same subject—Duty to retreat.**—In the older cases it was said that one could never kill in self-defense, if he could avert the threatened danger by flight. While many courts still adhere to this rule, some courts now hold that if a person is where he has a right to be, and is himself in no fault, he is not obliged to fly from an assailant who, by violence or surprise, maliciously seeks to take his life, or do him enormous bodily harm, but that he may stand his ground and oppose force by force, and if in the reasonable exercise of his right of self-defense his assailant is killed, it is justifiable.[81]

Some courts restrict this doctrine to cases where the attack is made on the defendant in his dwelling or on his premises.[82] But where the attack is not made with a deadly weapon or with intent to kill the assailed, the latter cannot stand his ground and kill if there is a way to escape; he may, however, stand his ground and give back blow for blow, as in any other case of necessary defense.[83]

38. **Same subject—Killing by aggressor.**—The right of self-defense is a right allowed one who is himself in no fault. If one is himself the aggressor, or not being the aggressor, engages in a fight with an adversary, he may not later in the conflict kill even

[79] Erwin v. State, 29 Ohio St. 186, LEADING ILLUSTRATIVE CASES.
[80] Foster, Crown Law, p. 273.
[81] Erwin v. State, 29 Ohio St. 186, LEADING ILLUSTRATIVE CASES.
[82] Allen v. United States, 164 U. S. 492.
[83] 1 Bishop, New Criminal Law, § 850.

to preserve his life.[84] If, however, he withdraws from the conflict and notifies the other party of his withdrawal, his right of self-defense revives, and if his antagonist continues the fight and puts his life in danger, he may kill in self-defense.[85] In order to claim this right on withdrawal, the assailant must withdraw in good faith, declining further combat. A mere retreat while continuing the fight is not sufficient.[86] Nor is even a withdrawal sufficient unless he notify the other party of his intention to discontinue the combat.[87] Ordinarily the notification need only be such as would assure a reasonable man of this intention. If, however, the first attack by the assailant was so violent as to deprive his antagonist of his power to judge as a reasonable man, he must give such notice as does in fact apprise the other party of his intention.[88] Under no circumstances is one obliged to retreat from an attack when to do so would increase his danger.

39. **Same subject—Reality of danger.**—It has been seen in considering the effect of mistake of fact that one is excused for an act done under mistake of fact, if the mistake was a reasonable one and if the facts would have justified the act if they had been as the defendant believed them to be. Under this principle a person is excused if he takes the life of an assailant if, as a reasonable man, he

[84] 1 Hale, Pleas of the Crown, p. 482 (Eng.).
[85] People v. Button, 106 Cal. 628.
[86] Burris v. State, 34 Tex. Cr. App. 387.
[87] People v. Button, 106 Cal. 628.
[88] People v. Button, 106 Cal. 628.

believes his assailant is about to kill him, whether his life be actually in danger or not.[89]

40. **Defense of others.**—The rule in regard to acts done in defense of others is, that one may do in such defense whatever the other might in the same circumstances do for himself.[90] A son, to protect his mother, may kill even his father. A mother may assault one who attacks her daughter, and a guest may defend the house of his host. But, in general, one can do no more in defense of another than that other could do in defense of himself; therefore, a brother is not justified in killing a man to prevent him from seducing the former's sister.[91] In the case last cited, the court said: "It is not claimed that any direct force was attempted in this case, but that the felony intended was to be accomplished by the assistance of drugs administered or to be administered, and that where the power of resistance is thus overcome, and advantage thereof taken to violate her person, the act would be rape. The present case, however, falls short of coming within the principles that would justify the taking of life. Ample time and opportunity existed to enable the accused to resort to other available means to prevent the anticipated injury." A cannot, in defense of his brother B, justify the killing of C, if B was the aggressor in the fight between himself and C, for in such case B could not himself have justified the killing of C.[92]

[89] Campbell v. People, 16 Ill. 17, LEADING ILLUSTRATIVE CASES.
[90] 1 Bishop, New Criminal Law, § 877.
[91] People v. Cook, 39 Mich. 236.
[92] State v. Melton, 102 Mo. 683, 15 S. W. 139.

CHAPTER VI.

PARTIES TO CRIME.

41. **Principal in the first degree.**—Principals are of two kinds: principals in the first degree and principals in the second degree. A principal in the first degree is he who does the act constituting the offense. When it is said that a principal in the first degree is one who does the act, it is not meant necessarily that he does it with his own hand; he may so do it, or he may do it through an innocent agent. Thus, if A gives poison to B, to give to C, and B, not knowing that it is poison, gives it to C, and C dies thereof, A is the principal and not B. An innocent agent in this sense is any person who is not himself amenable to the law for his act. Thus, where A employed B, a child nine years old, to steal, it was held that whether A was liable as a principal or not depended on whether B, in taking the property, knew that he was doing wrong.[93] If B knew his act was wrong, then he himself was the principal in the first degree and not A.

42. **Principal in the second degree.**—A principal in the second degree to a crime is one who is present when the crime is committed and is aiding and abetting in its commission, but does not himself do the act.[94]

[93] Regina v. Manley, 1 Cox C. C. 104 (Eng.).

[94] Doan v. State, 26 Ind. 495, LEADING ILLUSTRATIVE CASES.

Presence. While the principal in the second degree must be present at the commission of the crime, he need not be so near as to be an ear- or an eye-witness of it. His presence may be constructive. He is constructively present if he is so situated during the commission of the crime as to be able to give aid to his associate with a view to insure the success of the common design. A waiting and watching at a convenient distance is sufficient; as if, in a case of larceny, he be placed where he may learn of the whereabouts of the custodian of the property, and be prepared to lure him away, or to detain him, or to give warning of his approach.[95] But his presence must be with the object of aiding in the perpetration of the crime. Therefore, where A and B went to steal horses, and B left A when they got within half a mile of the place where the horses were, and B went on, stole the horses and brought them to the place where A was waiting, and then A and B rode away with them, it was held that A was not a principal in the second degree, as his presence was not with the object of aiding in the larceny.[96]

43. **Same subject.**—But, if the abettor is consenting to the crime, and in a situation in which he might render any aid by arrangement with the perpetrator, it is sufficient to make him a principal in the second degree. For the presence of the abettor under such circumstances encourages the perpetrator to do the act by giving him hopes of

[95] Doan v. State, 26 Ind. 495, LEADING ILLUSTRATIVE CASES.
[96] Rex v. Kelly, Russ. & R. 421 (Eng.).

assistance. It has even been held that one may become a principal in the second degree by absenting himself from the scene of the crime.[97] In the case last cited, the accused was indicted as a principal in the second degree for larceny of thirty-two bales of cotton. The accused was a watchman employed to guard the cotton. He entered into an agreement with A, whereby he was to absent himself from the place where the cotton was stored, so that A might carry it off. He was so absent when the cotton was stolen by A. The court said in affirming the conviction of the accused: "The test to determine whether he is a principal, rather than an accessory, is, whether he is so situated as to make his personal help available—not actual, physical help necessarily, but help of any kind—not help rendered in or by actual presence, but constructive presence as well. * * * Therefore, if a person with knowledge that the commission of the crime has been determined upon, gets away and keeps away from the spot for the purpose of facilitating the commission of it, he is a principal, although he is not present or near enough to give assistance physically and manually to his companions."

What is an aiding and abetting? The principal in the second degree must aid or abet. Mere acquiescence in the criminal act of another is not sufficient to render one guilty of the other's act. A is not in any degree responsible for a crime committed by B merely because he is with B when the crime is committed, even though he could have prevented

[97] State v. Poynier, 36 La. Ann. 572.

B from committing the crime and did not, or even though he mentally approved of it. There must be something more, some word or act, to make A responsible.

44. **Responsibility of accomplices.**—Where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates, committed in furtherance or in prosecution of the common design for which they combine. Thus, if A and B conspire to beat C, and, in beating him, B kills C, A as well as B is responsible for the killing; and if A and B combine to commit burglary in the house of C, and B, in carrying out the common design, kills C, A is guilty of murder.

The fact that several combine to commit a crime will not, however, make one liable for any and every act committed by another of the conspirators. If one of the confederates turn aside from the common design and commit a crime on his own account, the other is not liable for this crime. So, where A and B, having committed burglary, were disposing of the goods, and, on being accosted by a police officer, B killed the officer, it was held that A was not responsible for the killing, such killing not being within the intention of A, and not being the ordinary and probable result of the crime in which they were engaged at the time of the killing.[98]

45. **Same subject—Rules for determining responsibility.**—In the case last cited, the court lays down the following rules to determine responsi-

[98] Lamb v. People, 96 Ill. 73.

bility: "The principle which underlies and controls cases of this character is the elementary and very familiar doctrine, applicable alike to crimes and mere civil injuries, that every person must be presumed to intend, and is accordingly held responsible for, the probable consequences of his own acts or conduct. When, therefore, one enters into an agreement with others to do an unlawful act, he impliedly assents to the use of such means by his co-conspirators as are necessary, ordinary or usual, in the accomplishment of an act of that character. But beyond this his implied liability cannot be extended. So, if the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not. But, where the unlawful act agreed to be done is not of a dangerous or homicidal character, and its accomplishment does not necessarily or probably require the use of force or violence, which may result in the taking of life unlawfully, no such criminal liability will attach merely from the fact of having been a party to such an agreement."

If the crime in which it is sought to hold one accomplice liable for the act of the other requires specific intent for its commission, the specific intent must be proved. Thus, where an officer was shot by A while attempting to arrest A and B, it was

held that while B would have been liable for murder if A had killed the officer—murder not requiring a specific intent to kill—he could not be convicted of assault and battery with intent to kill the officer on the ground of a common purpose to resist arrest.[99] There is no difference between the punishment meted out to a principal in the first degree and that meted out to a principal in the second degree.[1]

46. **Accessory before the fact.**—Accessories are of two kinds: accessories before the fact and accessories after the fact. An accessory before the fact is one who procures, counsels, commands, or abets another to commit a felony, but is himself absent when the felony is committed. The accessory must be absent when the crime is committed. If he is present he is not an accessory, but a principal. The crime counseled must be in fact committed, if not, the person counseling is guilty only of solicitation. It is not necessary that there should be any direct communication between the accessory and the principal. It is enough if the accessory direct an intermediate agent to procure another to commit the felony; and it is sufficient, even though the accessory does not name the person to be procured, but merely directs the agent to employ some suitable person.

The accessory before the fact is responsible not only for the precise crime which he commanded to be done, but for other crimes committed in the carrying out of the crime counseled by him. His

[99] State v. Taylor, 70 Vt. 1.

[1] Doan v. State, 26 Ind. 495, LEADING ILLUSTRATIVE CASES.

responsibility for such other crimes is practically that of a principal in the second degree for the acts of his accomplice done in the commission of the original crime undertaken. Thus, if A command B to burn the house of C, and he does so, and the fire is communicated to the house of X, A is an accessory to the burning of X's house; and if A command B to rob X and, while being robbed, X defends himself and is killed by B, A is accessory to the murder of X. If the principal turn aside from the commission of the crime commanded and commit a different crime—as where A orders B to burn the house of C, and B, instead, knowingly burns the house of X, A is not an accessory to this burning. But, if the crime commanded is committed, the mere fact that the means used were different from the means counseled, will not excuse the accessory from liability. Thus, if A command B to kill C with a gun, and B kills him with poison, A is still accessory to the murder. One can be an accessory to a felony only. The counseling that makes one accessory to a felony, if done to procure treason or a misdemeanor, makes the counselor a principal.[2] The punishment of an accessory is, in general, the same as that prescribed for a principal.

47. **Accessory after the fact.**—An accessory after the fact is one who, knowing a felony has been committed by another, relieves, comforts, or assists the felon.[3]

[2] Baker v. State, 12 Ohio 214, LEADING ILLUSTRATIVE CASES.

[3] Wren v. Commonwealth, 26 Gratt. 952 (Va.), LEADING ILLUSTRATIVE CASES.

Knowledge. Under the definition this accessory must "know" that a crime has been committed. If he does not there is no "evil mind." But, when it is said he must "know," it is not meant that he must have actually seen the crime committed; on the other hand, mere suspicion that the person aided has committed a felony is not sufficient. The aid furnished the felon must be furnished to him personally. Merely suffering a person to escape who could have been arrested or detained does not make one an accessory; nor does the mere secreting of stolen property make the person secreting it an accessory to the larceny.

48. **What makes one an accessory after the fact.** —Merely accepting money not to prosecute a criminal, or knowing of a felony but failing to make it known to the proper authorities, does not make one an accessory after the fact;[4] nor does persuading witnesses against a felon not to appear to give evidence against such felon, make one an accessory after the fact to the felon's crime. On the other hand, it was held, in Blakely v. State,[5] that suppressing and preventing evidence at a coroner's inquest, made one an accessory after the fact. The court said: "We are of opinion that the facts upon which the case rests bring it within the purview of the general law and our statute as to accessories. Appellant, if he did not, in fact, conceal May [the criminal] until the perjured testimony was given

[4] Wren v. Commonwealth, 26 Gratt. 952 (Va.), LEADING ILLUSTRATIVE CASES.

[5] 24 Tex. App. 616.

which justified him before the inquest, certainly aided him to the extent that he was not arrested and punished for his crime until the perjury was discovered, and but for the discovery, the aid which defendant attempted to give him would have proven effectual in affording him perfect and complete immunity from apprehension, trial, and punishment for the murder he had committed."

The felony must be complete at the time the aid is rendered. Therefore, if A shoot B, and while B is still alive, X aids A to escape, and later B dies, X is not accessory to murder, though he is accessory to the crime committed by A at the time the aid was rendered, e. g., assault with intent to kill, if such crime be a felony.—At common law it was considered the duty of a wife, and of no other, to receive her husband even though he was a felon; therefore, she was not accounted an accessory in so doing. This privilege has been largely extended by statute, so that in many jurisdictions persons standing in close relationship to a felon cannot be indicted for aid furnished him after the felony has been committed. The Rhode Island statute, for example, provides that a husband, wife, parent, grand-parent, child, grand-child, brother, or sister, by consanguinity or affinity, shall not be liable as accessory after the fact for harboring or relieving a felon.

49. **Principal and agent.**—In the civil law the principal is liable for many acts done by his agent without his express command and even for some acts when done against his express command. In the criminal law a principal is, in general, liable for

the acts of his agent only when done by the master's orders, express or implied, for intent is essential to guilt in crime.

Thus, in State v. Smith,[6] the defendant was convicted for wilfully and unlawfully having in possession with intent to sell, and for selling, adulterated milk. On appeal the conviction was reversed, the court saying: "If, under the statute under which this indictment has been found, a master can be convicted upon the mere proof of possession with intent to sell or exchange by his servant, then the master may be punished for an act in which he not only did not participate, but which was done contrary to his orders, and for the servant's own private gain. We are not prepared to adopt this view of the statute. In order to charge the master, where the milk is found in possession of a servant, we think there should be evidence, in addition to the proof of possession for sale or exchange by the servant, that the servant, in having it so for sale or exchange, was acting for and in pursuance of the will of the master; and such being the proof, the master might be convicted, for in such a case the possession of the servant is in law the possession of the master. We think, therefore, that the court should have instructed the jury that proof of possession by the servant was not sufficient to convict the defendant, adding, of course, if there were other evidence tending to show that the servant, in having the milk for sale or exchange, was acting for and in pursuance of the will of the master,

[6] 10 R. I. 258.

such further instructions as would enable the jury properly to decide in view of such other evidence."[7]

50. **Same subject—Under statutes.**—Under the provisions of particular statutes in some states it is held that the principal is criminally responsible for the act of his agent even though he did not authorize such act. In Noecker v. People,[8] A was convicted for an illegal sale of intoxicating liquor, made by his clerk in quantity less than a gallon, which was prohibited to one not having a license so to sell. The language of the statute was "whoever, by himself, clerk, or servant, shall sell," etc. On appeal the court held that the conviction was proper. The court said: "Some of the sales testified to were made by clerks of the defendant. The court rejected testimony offered by the defendant, as to what instructions he gave his clerks in relation to the sale of intoxicating liquors. This is assigned for error. We think the testimony was properly excluded. The language of the statute is, whoever, by himself, clerk, or servant, shall sell, etc., shall be liable. The testimony was uncontradicted that the defendant kept intoxicating liquors for sale, and the defendant would be responsible for the acts of selling by his clerks, no matter what might have been his instructions to them."

[7] See also State v. Bacon, 40 Vt. 456, LEADING ILLUSTRATIVE CASES.
[8] 91 Ill. 494.

CHAPTER VII.

INCOMPLETE OFFENSES.

51. **Attempt.**—As indicated, the law does not punish a mere intent not coupled with an act. On the other hand, the law does not withhold all punishment because a person has not done all the acts he intended to do. If a person sets out to commit a crime and does some act in pursuance of his intention he may be punished for such act though it fall short of the full crime intended by him. Thus if A shoot at B, intending to kill him, and miss him, while he cannot be convicted of murder, he is guilty of the crime of attempt to murder.

Attempt and preparation. It is not every act, however, done in pursuance of an intent to commit a crime, which is punished as a crime, itself. The act to amount to an attempt, must be sufficiently near to the last act intended to be something more than mere preparation to commit the intended crime. It is impossible to lay down any hard and fast rule as to how far the accused must proceed toward the commission of the full crime he intended to commit in order to be guilty of an attempt. Each case must be decided on its own circumstances.

52. **Same subject—Proximity of act to crime intended.**—It is certain that the act need not be the last act falling short of the full crime intended. It is equally certain that if the only act done be far

removed from the last act necessary to complete the intended crime, the attempt is not complete. It is a question of degree. "If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a locus pœnitentiæ in the need of a further exertion of the will to complete the crime * * * the degree of proximity held sufficient may vary with circumstances, including among other things the apprehension which the particular crime is calculated to excite,"[9] Thus it has been held that making up a false invoice at the place of exportation, with intent to defraud the revenue, is not an attempt, if not followed up by attempting to use it.[10] Delivering poison to a person and soliciting him to put it into another person's well, is not an attempt to kill the owner of the well;[11] nor is the procurement by a prisoner of tools adapted to jail-breaking an attempt to break jail.[12] It has even been held that putting a finger on the trigger of a pistol at half cock, was not an attempt to murder.[13]

On the other hand, where A made a false key with intent to burglarize the house of B, it was held that the attempt to commit larceny from the house was complete.[14] In People v. Murray,[15] the accused was indicted for an attempt to contract an incestuous

[9] Holmes, C. J., in Commonwealth v. Peaslee, 177 Mass. 267, 59 N. E. 55.
[10] United States v. Twenty-eight Packages, Gilpin 306 (U. S.).
[11] Stabler v. Commonwealth, 95 Pa. 318.
[12] State v. Hurley, 6 L. R. A. (N. S.) 804 (Vt.).
[13] Regina v. St. George, 9 C. & P. 483 (Eng.).
[14] Griffin v. State, 26 Ga. 493.
[15] 14 Cal. 160.

marriage. The evidence showed that he had eloped with his niece, and engaged a friend to bring a magistrate to perform the marriage ceremony. On conviction and appeal, the court said: "Something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt, and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made. * * * Until the officer was engaged and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said in strictness that the attempt was made." Yet, in another case, when A took a false oath to procure a marriage license, he was held guilty of an attempt to marry without a license.[16]

53. **Physical inability to commit crime intended.** —It sometimes happens that the full crime the accused intended to commit is impossible of accomplishment either because he has used means not adapted to securing the end aimed at, or because the object at which the act is directed is, unknown to him, not within reach. Under these circumstances may the accused be convicted of an attempt to commit the crime intended? By the weight of authority he may, though the decisions are not uniform. Thus it has been held in several of our states that a person is properly convicted of an attempt to commit larceny if he opened a cash drawer, or put his hand in

[16] Regina v. Chapman, 2 C. & K. 846 (Eng.).

another's pocket with intent to steal, though it turned out that the drawer or the pocket was empty at the time.[17] Clark v. State[18] was such a case. The court in affirming a judgment of conviction said: "If an indictment for an attempt to steal the contents of a trunk or room would not be good where it transpired that there was nothing in the trunk or room, then it would seem to follow that the indictment in case where there were goods in the trunk or room would have to allege what particular goods the thief purposed to steal; and if necessary to allege, it is necessary to prove, and how could this be proven where there was a variety of different goods, and the thief was arrested before he had laid hands upon any article?" Some courts have held that there was no attempt in such cases.

54. **Same subject—Means not adapted to end.**—Where the means used by the accused are inappropriate to the end desired by him, the weight of authority seems to be in favor of holding that the accused can be convicted of attempt, though here again we meet with a conflict in the decisions. Thus it has been held that one cannot be convicted of an attempt to murder, by proof that he fired a gun at another at a distance of forty feet, believing it to be loaded with ball, if in fact it was loaded with powder only.[19] On the other hand, it was held in State v. Glover,[20] that A was guilty of attempt to kill in administering a drug to B, A thinking the

17 People v. Moran, 123 N. Y. 254, LEADING ILLUSTRATIVE CASES.
18 86 Tenn. 511.
19 State v. Swails, 8 Ind. 524.
20 27 S. C. 602.

amount of the drug administered sufficient to kill B, though in fact it was not.

55. **Same subject—Legal inability.**—If the full crime intended cannot be committed because of some legal inability, the better opinion is that the acts done by the accused cannot amount to an attempt.[21] As said in the case of People v. Gardiner,[22] "If an assault should be made on a man dressed as a woman, with intent to ravish, the assailant believing the person assaulted to be a woman, he could not be convicted of an attempt to ravish, because in such case, the commission of the crime of rape would be a legal impossibility." Neither can a boy under fourteen be convicted of an attempt to rape, since if he had succeeded in his attempt he would not be legally guilty of rape.[23]

Intent. Attempt is one of the crimes that requires specific intent. A general "guilty mind" or a constructive intent will not suffice. Therefore though one may be guilty of murder if, while committing a felony, he kills another, if he merely wounds the person he cannot be convicted of the attempt to murder.

56. **Solicitation.**—It is a crime at common law to solicit another to commit a crime, if the person solicited refuses or fails to commit the crime solicited. If he commits such crime, the crime of solicitation is merged and the person soliciting becomes an accessory before the fact or a principal in the second

[21] Marley v. State, 58 N. J. L. 207, LEADING ILLUSTRATIVE CASES.

[22] 73 Hun 66 (N. Y.).

[23] Foster v. Commonwealth, 96 Va. 306. Contra, Commonwealth v. Green, 2 Pick. 380 (Mass.).

degree. Solicitation to commit any felony is a misdemeanor, but the law does not punish the solicitation to commit every misdemeanor. With respect to various misdemeanors, involving little or no moral turpitude or prejudice to society, solicitation to their commission is not in law an offense, while in the case of misdemeanors of more serious character solicitation to their commission is held indictable. The cases cannot all be reconciled.

57. **Conspiracy.**—As a person who solicits another to commit a crime is guilty of a crime, so the conspiring of two persons to commit a crime is likewise indictable, though the intended crime is never committed. Conspiracy is defined to be a confederating of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by some unlawful means.[24] Conspiracy is a misdemeanor. If the end sought is unlawful we have seen that even the solicitation by one of another to accomplish that end is a crime; much more is it a crime if two persons solicit each other—or agree—to attain that end. The unlawful purpose sought need not be unlawful in the sense that it would be a crime if done by a single person. It is enough if the acts agreed to be done, although not criminal, are wrongful, that is, amount to a civil wrong. Thus an agreement to hiss an actor,[25] or to slander a person,[26] or to obtain copies of examination questions from a public examining board,[27] have been held criminal

[24] 2 Bishop, Criminal Law, § 175.
[25] Anonymous, 2 Camp. N. P. 358 (Eng.).
[26] Rex v. Armstrong, 1 Vent. 304 (Eng.).
[27] State v. Stewart, 32 Wash. 103.

conspiracies, though none of these acts, if done by one individual, would have been indictable.

Unlawful means. Even though the act agreed to be done be lawful, if the means agreed on to accomplish that act be unlawful the crime of conspiracy is committed at common law. Thus it has been held that a combination among laborers to bring about a raise of their wages was an indictable conspiracy.[28] The gist of the crime is the agreement; the crime is complete as soon as the agreement is entered into, no overt act in carrying out the agreement is necessary.[29]

[28] Rex v. Journeyman-Tailors, 8 Mod. 10 (Eng.).

[29] State v. Buchanan, 5 H. & J. 317 (Md.). In some states an overt act is necessary in certain specified cases. See People v. Daniels, 105 Cal. 262.

PART III

SPECIFIC CRIMES

CHAPTER VIII.

OFFENSES AGAINST RELIGION AND MORALS.

58. **Blasphemy.**—Christianity is a part of the common law of England and that law regarded as criminal many acts done in derogation or supposed derogation of religion, and of that particular form of religion established in England. Among these Blackstone enumerates: (1) apostasy, or the total renunciation of Christianity, by embracing either a false religion or no religion at all; (2) heresy, or the denial of some of the essential doctrines of Christianity as promulgated by the established church; (3) non-conformity to, or reviling of the ordinances of the established church. Freedom of worship being one of the objects sought by our ancestors in their emigration to America, these offenses, grounded as they were on the existence of an established church, were no part of the law brought to this country. A fourth offense against religion mentioned by Blackstone, that of blasphemy, has been held to be a crime in this country as well as in England. Blasphemy is defined by Blackstone to be the denial of the existence of God, or contumelious reproaches of Christ.

In the case of People v. Ruggles,[30] Ruggles was indicted for wickedly, maliciously and blasphemously uttering, in the presence of pious Christian people, certain blasphemous words concerning Christ. The words were spoken in a wanton manner, and not in a serious discussion of any controversial point of religion. It was contended that since freedom of speech and of religious belief was guaranteed by the Constitutions of New York and of the United States, the defendant could not be punished for such words. But the court said: "There is nothing in our manners or institutions which prevents the necessity or application of that part of the common law making blasphemy an offense against the common law. Such an offense tends to corrupt the morals of the people, and to destroy good order, irrespective of any religious establishment, or the right of any church. We stand equally in need, now as formerly, of all that moral discipline, and of those principles of virtue, which help to bind society together. The people of this state, in common with the people of this country, profess the general doctrines of Christianity, and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but even in respect to the obligation due society and good order." The court held that the free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject are granted and secured by the Constitution, but that to revile, with malicious and blasphemous contempt, the

[30] 8 Johns. 290 (N. Y.).

religion professed by a large part of a community, is an abuse of that right, and a crime. The like doctrine has been enunciated by other courts, and the malicious disturbance of religious meetings has many times been held punishable.[31]

59. **Profane swearing and enchantment.**—To this head likewise may be referred the crime of profane and common swearing and cursing. This was made a misdemeanor by an early English statute. Similar statutes, punishing public cursing, are in force in this country. Blackstone mentions as another species of offense against religion, witchcraft, conjuration and enchantment; and says that to deny the existence of these is flatly to contradict the revealed words of God. Many persons were executed in England for these crimes, but, needless to say, prosecutions for them have long since ceased.

60. **Simony and Sabbath-breaking.**—Simony was another offense against religion. Simony is defined to be the corrupt presentation of any one to an ecclesiastical benefice, for gift or reward. Profanation of the Lord's day is another offense classed as an offense against religion. Any work, other than works of necessity, was regarded as a profanation. Most if not all of the states of the Union have passed statutes forbidding ordinary labor on Sunday, works of necessity and charity excepted. The constitutionality of such laws has been frequently tested on the ground that they interfered with the freedom of religious belief, worship or practice; but they have uniformly been upheld as dealing with and having

[31] See State v. Jasper, 15 N. C. 323.

respect to the Sabbath as a civil and political institution.

Works of necessity. The authorities are not in complete accord as to what constitutes a work of necessity or of charity. A lock-keeper on a canal has been held not liable to conviction for opening the lock gates on the Sabbath for the passage of vessels,[32] and a hack driver has been held not liable for driving passengers on the Sabbath, under the belief that the journey was a necessary one.[33] But the work must be a work of charity or necessity, and it is not "necessary" in the eye of the law if it could have been done on some previous day, but was postponed until Sunday in order that the defendant might do other work not of necessity on the previous days. In State v. Goff,[34] Goff was indicted for cutting and binding wheat on Sunday. Goff was a poor man and had no cradle of his own. For a week previous to the cutting he was swapping work in harvest with his neighbors, who agreed to help him afterwards. When his neighbor quit cutting on Saturday evening, Goff borrowed his cradle, to cut with on Sunday. The weather on that day was threatening, and he cut his wheat. The wheat had been ripe enough to cut four or five days before that time. The court held he was not excused, as it was not shown that he had even tried to procure a cradle before Sunday; but that he was laboring for others when he should have been at work for himself.

[32] Murray v. Commonwealth, 24 Pa. 270.
[33] Myers v. State, 1 Conn. 502.
[34] 20 Ark. 289.

61. **Indecency and immorality.**—As nothing is more important to a state than public morality and decency, any act which offends against either is indictable. The law, however, being intended to regulate the conduct of men only as members of civil society, does not undertake in general to punish private acts of immorality and indecency. As said by Blackstone, however abandoned a man may be in his principles, or vicious in his practice, provided he keep his wickedness to himself, and do not offend against the rules of public decency, he is out of reach of human laws; but if he make his vices public, though they be such as seem principally to affect himself, as drunkenness, or the like, they then become, by the bad example they set, of pernicious effect to society and indictable. "The common law is the guardian of the morals of the people, and their protection against offenses notoriously against public decency and good morals." The reports abound in cases where convictions have been enforced for various acts against public decency under the above general principle of the common law.

Public drunkenness is indictable, so is public lewdness. It has been held a misdemeanor to bathe in the sea near inhabited houses, from which the person might be seen, although the houses had been recently erected, and previously thereto it had been customary for persons in great numbers to bathe at such place.[35] So it has been held indictable for a master to permit his slave to walk about in view of the public so scantily clad as not to protect his per-

[35] Rex v. Cruden, 2 Camp. N. P. 89 (Eng.).

son from indecent exposure.[36] Conspiring to put a girl into the possession of a man for immoral purposes has been held indictable.[37] The exhibition of an indecent picture was held indictable in Commonwealth v. Sharpless;[38] night-walking, in State v. Dowers;[39] keeping a common gaming house, in People v. Jackson;[40] exhuming a body for dissection, in Rex v. Lynn;[41] sodomy, in Commonwealth v. Thomas;[42] leasing a house for immoral purposes, in People v. Erwin;[43] the utterance of obscene words in public, in Bell v. State;[44] being a common scold, in James v. Commonwealth;[45] openly and publicly dwelling in lewdness and adultery, in State v. Cagle.[46]

In general, it may be laid down that all offenses as are of such a nature as to corrupt the public morals, or to outrage the sense of public decency, whether committed by words or acts, are indictable at common law, without the aid of a statute.

[36] Britain v. State, 3 Humph. 203 (Tenn.).
[37] Rex v. Delaval, 3 Burr. 1434 (Eng.).
[38] 2 S. & R. 91 (Pa.).
[39] 45 N. H. 543.
[40] 3 Denio 101 (N. Y.).
[41] 2 T. R. 733 (Eng.).
[42] 1 Va. Cas. 307.
[43] 4 Denio 129 (N. Y.).
[44] 1 Swan 42 (Tenn.).
[45] 12 S. & R. 220 (Pa.).
[46] 2 Humph. 414 (Tenn.).

CHAPTER IX.

OFFENSES AGAINST PUBLIC AUTHORITY AND PEACE.

62. **Classification of offenses.**—Due regulation of public justice and the orderly execution of the public authority are of vital importance to the state. Therefore anything that interferes with either is peculiarly within the province of the criminal law. Blackstone classes as among the offenses against public justice: embezzling or destroying records, or falsifying proceedings of a court; compelling a prisoner to turn state's evidence by too vigorous imprisonment; obstructing the execution of lawful process; escape of a person arrested, before being confined in jail; breach of prison after such confinement; rescuing a prisoner under lawful apprehension; returning from transportation for crime; taking a reward under the pretense of helping the owner to recover his stolen goods; receiving stolen goods, knowing them to be stolen; receiving back stolen goods by the owner under an agreement not to prosecute the thief, otherwise called compounding a felony; barretry; maintenance; champerty; conspiracy to indict an innocent person who is accordingly indicted and afterwards acquitted; perjury; subornation of perjury; bribery; embracery; rendering a false verdict by jurors; negligence of public officers; oppression by judicial officers; and extortion.

The law relating to some of the crimes above

enumerated will be treated of at large later on; of the more important of the remainder a few words are given here. Embezzling of public records no doubt is still punishable with us as at common law, but many states now have statutes providing specifically for this crime. Obstructing the execution of lawful process, or resisting an officer in the discharge of his duty, is a misdemeanor, and this applies to the person against whom or against whose property the process is directed, or to any other person obstructing the officer. But to make one guilty of this crime the process must be lawful. If the officer is acting unlawfully in trying to effect an arrest, or to attach property, the person whom he is attempting to arrest, or whose property he is about to seize, may lawfully resist the arrest or attachment, and he may use such force as is necessary to prevent the unlawful purpose of the officer, except that he cannot kill unless his life is put in danger by the officer.

63. **Escape and prison-breach.**—*Escape.* It is an indictable offense for a person in lawful custody to escape from such custody. If the escape is with the privity of the officer, it is also an indictable offense as to him. An officer is indictable even though he did not connive at or consent to the escape, if the escape was made possible by his negligence. As an officer is responsible for the safe custody of his prisoner, he may use force to prevent his escape. If the prisoner is in custody for a felony, at least if it be for one of the graver felonies, such as murder, arson, robbery, or rape, the officer may use any force necessary to prevent the escape, even to the taking of the

prisoner's life. If, however, the offense for which the prisoner is in custody be only a misdemeanor, the officer cannot kill to prevent an escape. He can use such force only as is necessary to prevent an escape, short of taking life.

Prison-breach. At common law escaping from prison wherein one was lawfully confined for any cause whatever, whether civil or criminal, and whether he were actually within the walls of the prison, or in the stocks, or in the custody of a person who had lawfully arrested him, was a felony, and this whether he departed with or without the keeper's leave. It is still punishable with us as a common law offense, and subject to the punishment of fine and imprisonment.[47]

64. **Rescue and allied offenses.**—The crime of rescue is the forcibly and knowingly freeing another from lawful arrest or imprisonment, and it is generally the same offense in a stranger or friend so rescuing, as it would have been in a jailer to have voluntarily permitted an escape. At common law, therefore, it was a felony to rescue a person imprisoned for a felony, and a misdemeanor to rescue a person imprisoned for a misdemeanor. As said by Mr. Bishop,[48] "The government requires its subjects to do more than simply abstain from attempting its overthrow. It requires them to give, when called upon, their active assistance to it, and at all times to refrain from casting obstructions in the way of its several departments or functions. Therefore every

[47] State v. Doud, 7 Conn. 384.

[48] 1 Bishop, Criminal Law, §§ 358, 368.

violation of these duties, being sufficient in magnitude for the law to regard, is criminal." Any acts tending to defeat the objects of government, as forcibly or unlawfully preventing the holding of an election; bribing or corruptly influencing an elector; casting more than one vote; disobeying an order of a justice of the peace or a judge; refusing to assist an officer, when called upon, to make an arrest, or suppress a riot or affray; preventing the attendance of a witness or a juror on a court, are all indictable misdemeanors at common law.

65. **Compounding a crime and bribery.**—*Compounding.* Another common law offense against public justice was compounding a felony, or agreeing for a reward with a person who has committed a crime, not to prosecute him therefor. This is still an indictable offense with us. In some states, however, statutes have been enacted allowing certain offenses to be compounded. These statutes usually require that the compounding be done in open court and with the permission of the magistrate or judge.

Bribery. Another offense against public justice and authority is bribery. Bribery is the voluntary giving or receiving of anything of value in corrupt payment of an official act, done or to be done.[49] It is any attempt to influence an officer in his official conduct, whether in the executive, legislative or judicial department of the government, by the offer of a reward or pecuniary consideration. It is not even necessary in all cases that the person bribed shall be a public officer. It is enough if the duty in per-

[49] 1 Bishop, Criminal Law, § 468.

formance of which the attempt to influence him is made is a public duty, such as voting at a public election or on a public question.[50]

66. **Embracery and barratry.**—*Embracery.* Embracery is defined to be an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like.[51] It may be committed either by one of the parties to the suit or by a stranger. It is immaterial whether the jury give a verdict or not, or whether if given it be true or false. Embracery is a misdemeanor, and is punishable by fine and imprisonment.

Barratry. Common barratry, also spelled barretry, is the offense of frequently exciting and stirring up quarrels between persons either at law or otherwise.[52] Barratry is a misdemeanor.

67. **Maintenance and champerty.**—*Maintenance.* Maintenance is an offense that bears a near relation to barratry, and is defined to be an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money, or otherwise prosecuting or defending it.[53] A person may, however, maintain the suit of his near relative, servant, or poor neighbor, out of charity or compassion, without being guilty of maintenance.[54] Maintenance is a misdemeanor.

Champerty. Champerty is a species of maintenance, and is defined by Blackstone as a bargain with

[50] See Curran v. Taylor, 92 Ky. 537.
[51] 4 Blackstone, Commentaries, p. 140.
[52] 4 Blackstone, Commentaries, p. 134.
[53] 4 Blackstone, Commentaries, p. 134.
[54] 4 Blackstone, Commentaries, p. 135.

a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense. The law in relation to champerty has been modified in some of the states of the Union, and in others was never adopted.[55]

68. **Riot, affray, unlawful assembly and rout.**—*Riot.* Another offense against the public peace is riot. A riot is defined to be "a tumultuous disturbance of the peace, by three persons or more assembling together of their own authority, with an intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful."[56]

Affray. An affray is the fighting of two or more persons in some public place, to the terror of the people.[57]

Unlawful assembly. An unlawful assembly is when three or more persons assemble themselves together to do an unlawful act, and part without doing it, or making any motion toward it.[58]

Rout. A rout is where three or more meet to do an unlawful act upon a common quarrel, and make some advances toward it.[59] The distinction between these offenses is that in a riot there must have been

[55] James v. Commonwealth, 12 S. & R. 220 (Pa.).
[56] 1 Hawkins, Pleas of the Crown, p. 513.
[57] 4 Blackstone, Commentaries, p. 145.
[58] 4 Blackstone, Commentaries, p. 146.
[59] 4 Blackstone, Commentaries, p. 146.

a tumultuous meeting, and the purpose for which the rioters assembled must have been executed with violence; a rout is a similar meeting where there has been something done towards the execution of the common purpose, but the purpose has not been actually executed; while an unlawful assembly is where there has been a mere assembly for a purpose which if executed would amount to a riot, but where there has been no overt act done to execute it.

69. **Same subject—Lawful assembly.**—It is not unlawful for a man to assemble his friends at his house for the purpose of defending it against an unlawful entry, or of defending his person or his family against attack. It is said, however, that he cannot so assemble his friends to defend any property other than his house, not even the surrounding premises. Nor can he assemble persons for the defense even of his person against those who threatened to beat him if he go abroad, for in such a case, being forewarned, he can bind over such persons to keep the peace.[60] In riot all participants are principals, and therefore any person who engages in the riot, whether by words, gestures, signs, or by wearing a badge or ensign of the rioters, is himself guilty of riot, though he does no act of violence himself.

To constitute a riot the persons assembled must assemble without lawful authority, and the intention with which they assemble, or act, must be unlawful. If a sudden disturbance arise among persons lawfully assembled for an innocent purpose, they will at most be guilty of an affray. But though there

[60] 4 Blackstone, Commentaries, p. 146, note.

must be an evil intent, premeditated or otherwise, the object of the assembly may be lawful,—as to obtain possession of land to which one or more of the parties are entitled—and yet the parties be guilty of riot, for they should obtain their object by legal means, and not make use of such violent methods as are likely to cause a disturbance of the public peace. And though persons be lawfully assembled, if while so assembled they should confederate to do an unlawful act of violence, suddenly purposed, and thereupon do such act, this is a riot.

70. **Acts tending to breach of peace.**—The law exists for the purpose of securing peace and tranquillity to the citizens of the state. Acts, therefore, that either are a breach of the peace or have a direct tendency to a breach of the peace, if of sufficient magnitude, are indictable as misdemeanors. The books abound in cases of prosecutions for acts held punishable on the ground solely that they tended to provoke a breach of the peace. It has been held indictable to erect an effigy of St. Patrick in a locality in which the act would be likely to be resented.[61] In this case Gibson, C. J., said: "The offense is clearly indictable at common law. No man has the right to trifle with the feelings of any large class of men so as to provoke them to a breach of the peace. If it is done by libel, no one doubts it is a misdemeanor; if it is done by effigy, is it less so? The gist of the offense is its tendency to provoke a breach of the peace."

On the same principle it is indictable to send a

[61] Commonwealth v. Haines, 4 Clark 17 (Pa.).

challenge to fight to a person; to disturb a family by violently knocking at the front door of the house for a long time;[62] forcibly entering on the land of another;[63] cheating with false dice; fraudulently tearing a promissory note; shooting the dog of another on the owner's porch; maliciously killing a cow; poisoning a chicken; writing threatening letters; girdling a tree growing on public ground; putting cow-itch on a towel to injure a person about to use it; cutting off the hair from the tail and mane of a horse; discharging a gun with intent to disturb a sick person; destroying a live tree or other landmark; setting fire to a number of barrels of tar belonging to another; casting the carcass of a dead animal into a well in daily use; throwing down another's fences in the night and turning cattle into his wheat; placing gunpowder in a stove; plastering doors with tar; breaking a number of grindstones belonging to another; cutting in pieces the cushions of a carriage; setting fire to a haystack; cutting down a mill dam; tying shingles to a horse's tail; and many other acts have been held punishable as tending to a breach of the peace.[64] There is, however, a difference of opinion in the courts as to the acts destructive to property mentioned above, some courts holding that for such acts, at least when done to inanimate property, to be indictable, they must be done either secretly or out of malice against the owner of the property; that when done only wantonly, they are not indictable.

[62] Rex v. Hood, 1 M. C. C. 281 (Eng.).
[63] Rex v. Bathurst, 3 Burr. 1702 (Eng.).
[64] Commonwealth v. Cramer, 25 Pa. Supr. Ct. 141.

CHAPTER X.

OFFENSES AGAINST PUBLIC HEALTH, POLICE AND ECONOMY.

71. **Acts affecting public health.**—Any act that is injurious to the health or comfort of a large number of persons in the community is an indictable misdemeanor, whether it constitutes a technical nuisance or not. The state has a vital interest in the health and well-being of its citizens and may well punish those who wilfully endanger either. Therefore, it has been held indictable at common law to keep large stores of gunpowder in a place and in a manner likely to cause injury;[65] to maintain a slaughterhouse near a dwelling;[66] to carry a person infected with smallpox along a public highway;[67] to maintain a factory, which emits offensive odors, near a dwelling;[68] to maintain a piggery near a public street and dwelling, whereby noxious smells corrupt the air;[69] to sell unwholesome food;[70] to bring a horse infected with glanders into a public place.[71]

In Commonwealth v. Cassidy,[72] Cassidy was indicted for a misdemeanor in circulating a false report by hand-bills posted on the street corners and

[65] Rex v. Taylor, 2 Str. 1167 (Eng.).
[66] Moses v. State, 58 Ind. 185.
[67] Rex v. Vantandillo, 4 M. & S. 73 (Eng.).
[68] People v. Detroit White Lead Works, 82 Mich. 471.
[69] Commonwealth v. Perry, 139 Mass. 198.
[70] Rex v. Dixon, 3 M. & S. 11 (Eng.).
[71] Regina v. Henson, 1 Dears. 24 (Eng.).
[72] 6 Phila. 82 (Pa.).

in other public places, calling on the citizens to look out for a child-stealer. It was contended that this was no offense. The court upheld the indictment, saying: "To do any act which is calculated to spread terror and alarm through the community, unless such act is right and proper in itself considered, or because necessary under special circumstances surrounding the commission of that which is complained of as constituting an offense, renders the person so offending liable to indictment at common law. * * * That this publication, given to the public in the manner above stated * * * is injurious to both the comfort and health of a large number of persons in the community in which the report has been put in circulation, is self-evident, because its tendency is to fill the mind with anxiety, fear, and alarm, to the absolute destruction of the comfort and happiness of many, and, by this means, is to a greater or less extent injurious to the health of persons brought under such influences."

72. **Bigamy.**—Offenses which do not range themselves under any of the foregoing chapters are usually classed as offenses against public police and economy. By this term is meant the due regulation and domestic order of the state whereby, as Blackstone expresses it, the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.[73] Such an

[73] 4 Blackstone, Commentaries, p. 162.

offense is bigamy. Bigamy is the marrying of a person by a person having another spouse living at the time. Bigamy is a felony at common law, and by statute in some of the United States. In other states it is a misdemeanor.

73. **Same subject—Validity of marriage—Divorce.**—It is not necessary, to constitute bigamy, that the second marriage be valid; indeed the very fact of a previous subsisting marriage renders, in all cases, the second ceremony of marriage of no effect. Neither does it relieve one from the guilt of this crime that the second marriage is such that it would have been no valid marriage even if the first marriage had never been entered into. In People v. Brown,[74] Brown was indicted for bigamy. He contended that, being a negro and the other party to the second alleged marriage being a white woman, and a statute of the state declaring void any marriage between whites and negroes, his second marriage was no marriage, and hence he could not be convicted of bigamy. The court, affirming a judgment of conviction, said: "The argument is that if the ceremony of marriage had taken place between parties who, if single, would be incapable of contracting marriage, the marriage ceremony is merely idle and void, and the respondent cannot be said to have been married the second time at all. The logic of the argument is not very obvious. It certainly cannot be based upon any idea that there must be something of binding and obligatory force in the second marriage, for every bigamous marriage is

[74] 34 Mich. 339.

void, and it is the entering into the void marriage, while a valid marriage exists, that the statute punishes. Nor can we understand of what importance it can be that there are two elements of illegality in the case instead of one, or why the party should be relieved from the consequences of violating one statute because the act of doing so was a violation of another, also." This crime is, of course, not committed if there has been a valid divorce between the first husband and wife at the time of the entering into the second marriage. But, if there were no such divorce at the time, no subsequent divorce will have the effect of relieving the party making the second marriage from liability to punishment for bigamy. If the first marriage, however, was, for any reason, not a valid marriage, as, e. g., if it was between a white person and a negro, where such marriages are declared void by statute, a second marriage by one of the parties would not be bigamous, for such party was not legally married at the time of the first marriage. If, however, the first marriage be merely voidable, i. e., liable to be annulled during the lifetime of the parties, but valid until so annulled by decree of a court, a second marriage, before such decree, will render the party contracting such second marriage liable to indictment for bigamy.

74. **Same subject—Marriage after a period of absence.**—Most of the statutes against bigamy contain exceptions to the penalty provided by them. The principal exception is that if one of the parties to the first marriage has been continually absent

from the other party for a period of years—usually seven—last past, and has not been known by the other party to be living within that time, the marriage of such other party—the one deserted—shall not render such person liable to be prosecuted for bigamy. The idea involved in this exception is that if a party to a marriage has been absent for seven years without being heard from, it is presumed that such party is dead, and the other party is entitled to contract a second marriage.

75. **Same subject—Intent necessary in bigamy.**—Much difference of opinion has arisen over the question if one party to a marriage bona fide (in good faith) believes, on reasonable grounds, that the other party is dead, and in such belief marries again within the period named in the statute, whether such second marriage renders the party contracting it liable to an indictment for bigamy. On the one hand it has been said that an evil intent is necessary to constitute this crime, and that if the defendant honestly believes, after due investigation, the other party to be dead at the time of the second marriage, there is neither a criminal intent, nor such negligence as sometimes supplies intent. On the other hand, it is said that the words of the statute are clear—"Any person having a husband or wife living"—that the statute provides for only one exception—that of absence—and that the courts have no right to read any other exception into the statute.[75]

[75] Compare Regina v. Tolsom, L. R. 23 Q. B. Div. 168 (Eng.); and Commonwealth v. Mash, 7 Met. 472 (Mass.).

In the last case cited above, Shaw, C. J., said: "Such belief [that the husband was dead] might arise after a very short absence. But it appears to us that the legislature intended to prescribe a more exact rule, and to declare as law that no one should have a right upon such ignorance that the other party is alive, or even upon such honest belief of his death, to take the risk of marrying again, unless such belief is confirmed by an absence of seven years. It was urged in the argument that, where there is no criminal intent, there can be no guilt; and, if the former husband was honestly believed to be dead, there could be no criminal intent. The proposition stated is undoubtedly correct in a general sense, but the conclusion drawn from it in this case by no means follows: Whatever one voluntarily does, he, of course, intends to do. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is charged with the criminal intent of doing it. On this subject, the law has deemed it so important to prohibit the crime of polygamy, and found it so difficult to prescribe what shall be sufficient evidence of the death of an absent person to warrant a belief of the fact, and as the same vague evidence might create a belief in one mind and not in another, the law has also deemed it wise to fix a definite period of seven years." The same difference of opinion exists among the judges as to whether a bona fide and reasonable belief that a valid divorce has been granted from the first marriage will excuse a second marriage by one of the

parties when it later appears that either no divorce had been granted, or that the alleged divorce was invalid.[76]

76. **Incest.**—Incest is sexual intercourse between persons related within certain degrees prescribed by statute. To convict of this crime it is necessary to prove the fact of intercourse, and the relationship within the prescribed degrees. It is not necessary to prove that the parties were related through lawful wedlock. The crime can be committed between a father and his foster daughter, or a brother and his illegitimate sister; but the relation must be clearly proved. It is not necessary to prove that the intercourse was accomplished by force and without consent, as in the case of rape; indeed it is held by some authorities that it is a joint offense, and can be committed only when both parties consent; that to constitute the crime both parties must be guilty; that force and want of consent exclude incest; that what is rape cannot be incest. Other courts hold that the consent of both parties is not necessary, but that the lack of such consent will not bar a prosecution for this crime.[77]

77. **Sodomy and buggery.**—Sodomy and buggery, called by Blackstone the infamous crime against nature, is carnal intercourse by a person with a beast, or any unnatural carnal intercourse with another person. This crime was a felony at common law, and punishable with death. It is generally provided for by statute in the United States.

[76] Compare Squire v. State, 46 Ind. 459, and State v. Goodenow, 65 Me. 30.

[77] Compare Baumer v. State, 49 Ind. 544, and State v. Nugent, 20 Wash. 522.

78. **Fornication.**—Fornication is illicit sexual intercourse. This crime was not punished by the courts of law in England in early times, but was left to the cognizance of the ecclesiastical courts. It is now punishable in England by statute, and in some of the United States by statute, and in some at common law. Fornication differs from rape in that no force is necessary, and there is consent of both parties. It differs from adultery in that it is not necessary that either of the parties be married.

CHAPTER XI.

ASSAULT.

79. **Elements of the crime.**—Assault is defined as "an attempt or offer, with force and violence, to do corporal hurt to another as by striking at him with or without a weapon; or presenting a gun at him at such distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one's fist at him; or by any such like act, done in an angry, threatening manner."[78]

To constitute an assault there must be some physical force exerted. Mere words are not sufficient. Therefore, where A, in a threatening tone, ordered B to come to him, and B, through fear of A, obeyed the command, it was held to be no assault. The court said: "If, therefore, the defendant had threatened the prosecutor with violence, and the threat had been accompanied by any show of force, such as drawing a sword or knife, or if he had advanced towards the prosecutor in a menacing attitude, even without any weapon, and had been stopped before he delivered a blow, and the prosecutor had been put in fear and compelled to leave the place where he had the lawful right to be, the assault would have been complete, although he was not at the time in striking distance. But in this

[78] 1 Hawkins, Pleas of the Crown, ch. 15 (Eng.).

case, so far as the facts recited in the first instruction should be considered, there was not even violence menaced, but, at most, only offensive and profane words. There must be an overt act, or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do a corporal injury—such an act as will convey to the mind of the other person a well-grounded apprehension of personal injury. Bare words will never do; for, however violent they may be, they cannot take the place of that force which is necessary to complete the offense. They are often the exhibition of harmless passion, and do not by themselves constitute a breach of peace, as the law supposes that against mere rudeness of language ordinary firmness will be a sufficient protection."[79] But any act importing an intent to do immediate harm is a sufficient act, as in the instances given by Hawkins above quoted. So it has been held an assault to ride a horse so near to the prosecutor as to endanger his person and create a belief in his mind that it was defendant's intention to ride him down.[80]

80. **Same subject—Present ability.**—It is sometimes said that there can be no assault unless the defendant has the present ability to inflict the threatened injury. But this present ability does not seem to be essential. If A should advance on B with intent to strike B, and B, being the faster runner, should flee just before A reached him, there should be no doubt that A would be guilty of an

[79] State v. Daniel, 136 N. C. 571.
[80] State v. Sims, 3 Strob. 137 (S. C.).

assault and yet he had no real present ability to strike B. And the doctrine of "present ability" is denied in many cases. In Martin v. Shoppee,[81] A was walking by the roadside, and the defendant, who was on horseback, rode after him at a quick pace; A then ran away into his own garden, and the defendant rode up to the gate and shook his whip at A, who was about three yards off; it was held that if the defendant rode after A so as to compel him to run into his garden for shelter to avoid being beaten, it was an assault, though defendant had no real ability to inflict injury on A.

81. **Same subject—Intent.**—The authorities are not in accord as to whether a specific intent to injure is necessary to constitute an assault. The question has arisen most often in the cases of pointing unloaded guns. In some of these cases it has been held that to point a gun which the defendant knows to be unloaded, is an assault, if the person at whom the gun is pointed supposes it to be loaded. Such a case was Commonwealth v. White.[82] In holding the defendant guilty in this case, the court said: "It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault.

[81] 3 Car. & P. 373 (Eng.).
[82] 110 Mass. 407.

It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace."

On the other hand, in Chapman v. State,[83] the court said: "We are of opinion that the better view is, that presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, such an assault as can be punished criminally, although it may sustain a civil suit for damages. The conflict of authorities on the subject is greatly attributable to a failure to observe the distinction between these two classes of cases. A civil action would rest upon the invasion of a person's 'right to live in society without being put in fear of personal harm'; and can often be sustained by proof of a negligent act resulting in unintentional injury. Peterson v. Haffner, 26 Amer. Rep. 81; Cooley on Torts, 161. An indictment for the same act could be sustained only upon satisfactory proof of criminal intention to do personal harm to another by violence."

If there is neither an intent to injure, nor reasonable cause for fear of injury, there is no assault. Thus, where A laid his hand on his sword and said: "If it were not assize time, I would not take such language from you," this was held to be no assault, for the words of A showed that he had no intent to injure B, and B was at the same time apprised that he was in no danger.[84] Where, however, the threat is of immediate injury unless the person threatened

[83] 78 Ala. 463.

[84] Tuberville v. Savage, 1 Mod. 3 (Eng.).

will forego the exercise of some right, it has been held that an assault is committed. Such a case was Keefe v. State,[85] where the defendant pointed a pistol at the prosecutor, saying, "If you do not pay me my money, I will have your life." An assault at common law is a misdemeanor.

82. **Aggravated assault.**—By statute in England and in the United States assaults done under certain circumstances or with certain weapons constitute aggravated assaults, punishable more severely than an ordinary assault. Thus, we have the crime of assault, or assault and battery, with intent to wound; the same with intent to injure; with intent to do grievous bodily harm; with intent to maim; with intent to prevent lawful apprehension; with intent to kill; with intent to rape. In some jurisdictions assault, or assault and battery, with particular weapons is made a specific crime. Thus, we have assault "with a deadly weapon"; "with firearms"; "with explosives"; "with poison"; "with stupefying drugs," etc. Where the common law assault is made an aggravated offense when done with a certain intent, as assault with intent to ravish, the specific intent mentioned in the statute must be proved. Thus, on an indictment for assault with intent to ravish, not only must the assault be proved, but it must also be proved that the defendant intended to achieve his purpose by force if necessary. On an indictment for an assault with intent to kill, proof of assault with intent to wound, or to maim, or to evade arrest, only, is not sufficient.

[85] 19 Ark. 190.

CHAPTER XII.

BATTERY.

83. **Elements of the crime.**—Battery is defined by Hawkins[86] to be "any injury whatsoever, be it ever so small, being actually done to the person of a man, in angry, revengeful, rude or insolent manner," as spitting in a person's face;[87] or touching him in anger; or violently pushing him out of the way;[88] kissing a woman against her will;[89] or putting harmful drugs into another's food, if the drug is taken into the body of the other with harmful results.[90]

In the case last cited, in which the defendant put cantharides in a fig and gave it to a woman to eat, the court, affirming conviction, said: "If one should hand an explosive substance to another and induce him to take it by misrepresenting or concealing its dangerous qualities, and the other, ignorant of its character, should receive it and cause it to explode in his pocket or hand, and should be injured by it, the offending party would be guilty of a battery, and that would necessarily include an assault; although he might not be guilty even of an assault, if the substance failed to explode or failed to cause any injury. It would be the same if it exploded in

[86] Hawkins, Pleas of the Crown, p. 110 (Eng.).
[87] Regina v. Cotesworth, 6 Mod. 172 (Eng.).
[88] Hawkins, Pleas of the Crown, p. 110.
[89] Regina v. Dungey, 4 F. & F. 99 (Eng.).
[90] Commonwealth v. Stratton, 114 Mass. 303.

his mouth or stomach. If that which causes the injury is set in motion by the wrongful act of the defendant, it cannot be material whether it acts upon the person injured externally or internally, by mechanical or chemical force."

Indirect application of force. The force need not be applied directly to the body of another; it is sufficient if it is transmitted to his body through some medium. In People v. Moore,[91] the defendant caught hold of the reins with which S was driving a horse and sleigh and turned the horse around, but did not touch S. On an indictment for an assault on S, the court said: "The force which he applied to the horse and sleigh just as effectually touched the person of Snyder as if he had taken him by his ears or shoulders and turned him right about face. The horse and sleigh were the instruments with which he directed and augmented his personal and physical force against and upon the body of Snyder. One receives bodily harm in a legal sense when another touches his person against his will with physical force, intentionally hostile and aggressive, or projects such force against his person."[92]

84. **Same subject—Intent.**—As in other crimes, a criminal intent is a necessary element in assault and battery. Therefore, one who accidentally touches another would not be guilty of this crime even though the person struck should be injured by the blow. Ordinarily the intent may be found from the intentional striking of a person. But even

[91] 50 Hun 356 (N. Y.).

[92] Compare Kirland v. State, 43 Ind. 146, LEADING ILLUSTRATIVE CASES.

though there be an intentional striking, if there be circumstances showing a lack of criminal intent, the crime is not committed. Thus a parent is not guilty of a battery in chastising his child unless the severity of the blows, or the character of the weapon, indicate an evil mind.[93] Nor is a conductor guilty of an assault and battery in forcibly ejecting a passenger from a car for non-payment of fare, if the conductor uses no more force than is necessary to put the passenger off, even though the conductor is mistaken in thinking the passenger's fare has not been paid.[94]

85. **Consent as negativing assault and battery.**— While consent of the person injured is in general no defense in criminal law, some crimes require for their commission that they be done against the consent of the injured party. Generally speaking, if one consents to the application of force against his person by another, such application of force does not amount to a battery. It is on this principle that blows given by the contestants in friendly contests, in games of football, boxing, etc., do not constitute batteries, each party consenting to the blows received. The law, however, does not allow a person to consent to such blows as will put his life in danger or will threaten him with serious bodily harm, and no consent given to such application of force will be a good defense to an indictment for assault and battery. As said by Cave, J., in Regina v. Coney,[95] "A blow struck in anger, or which is likely

[93] Commonwealth v. Randall, 4 Gray 36 (Mass.).
[94] State v. McDonald, 7 Mo. App. 510.
[95] 8 Q. B. Div. 534 (Eng.).

or is intended to do corporal hurt, is an assault; but a blow struck in sport, and not likely nor intended to cause bodily harm, is not an assault, and an assault being a breach of the peace, and unlawful, the consent of the person struck is immaterial. A blow struck in a prize fight is clearly an assault; but playing with single sticks, or wrestling, does not involve an assault, nor does boxing with gloves in the ordinary way."

86. **Force in excess of consent.**—Even in those cases where the consent of the person struck is a good defense, such consent is a defense only to the extent to which the consent reaches. If force beyond that consented to is employed, the consent will not excuse the excess of force used, for to that excess there was no consent. Thus if A consented to be struck on the hand, this would not excuse a blow in the face, nor would consent to be struck with a switch excuse a blow with a stick. In Mohr v. Williams,[96] a patient sued a doctor for assault and battery in operating upon her left ear. She had consented to an operation on her right ear, but while she was under the influence of ether, the doctor discovered that an operation was more necessary on the left ear than on the right ear, and operated on the left ear. It was held that the doctor was liable for assault and battery if the patient did not expressly or impliedly consent to the operation on the left ear. So where a physician obtained the consent of a young girl to medical treatment and under pretense that he was administering such treatment had carnal

[96] 95 Minn. 261

intercourse with her, it was held that he was guilty of assault, as she did not consent to the act done.[97]

87. **Fraud in obtaining consent.**—We have seen that consent obtained by fraud is in general no consent. This doctrine is frequently applied in cases of indictments for assault and battery. In Rex v. Rosinski,[98] R was indicted for assault on X, a young girl. R was a medical practitioner and in treating X told her it was necessary for her to take off her clothes that he might examine her. X consented, and R assisted in stripping her. It was held that if R did not believe it necessary to strip her, and obtained her consent by fraudulent representations, he was guilty of assault.

Consent of children. A person may not be of sufficient intelligence to give a lawful consent to a battery. Thus it is generally held in the United States that a man may be guilty of assault and battery in taking indecent liberties with a young girl, even though she consented to what was done.[99]

[97] Regina v. Case, 1 Den. C. C. 580 (Eng.).
[98] 1 M. C. C. 198 (Eng.).
[99] Commonwealth v. Roosnell, 143 Mass. 32.

CHAPTER XIII.

MAYHEM—FALSE IMPRISONMENT—KIDNAPPING.

88. **Mayhem.**—Mayhem is an aggravated form of battery. It is defined by Blackstone as the violently depriving another of the use of such of his members as may render him less able in fighting either to defend himself or to annoy his adversary.[1] This crime was recognized as a felony at a very early period of the common law, and the offender was punished by the loss of the same member of which he had deprived the party injured. Hawkins cites the following as the injuries constituting mayhem—the cutting off or disabling or weakening a man's hand or finger, striking out his eye or foretooth, or castrating him.[2] Other woundings have been added to this list by statute in England and the United States, such as: slitting the tongue, nose or lip, seriously disfiguring the person, destroying any organ or member of the body. Mayhem was a felony at common law.

89. **False imprisonment.**—East defines false imprisonment as every restraint of a man's liberty under the custody of another either in a gaol, house, stocks, or in the street, whenever it is done without a proper authority.[3] False imprisonment is a misdemeanor.

[1] 4 Blackstone, Commentaries, p. 204.
[2] Hawkins, Pleas of the Crown, p. 107 (Eng.).
[3] 1 East, Pleas of the Crown, chap. 9 (Eng.).

The force. Any force, no matter how slight, which, in fact, is sufficient to detain a person against his will is sufficient to constitute the crime. Indeed, there need be no direct physical force exerted and yet the crime will be completed. In Bloomer v. State,[4] the defendant met A in the road and told him that if he did not give up a certain paper he would cut his throat. Thereupon A took the paper from his pocket and handed it to the defendant. The court held that since the threat of the defendant prevented A from passing along the public highway, this was a false imprisonment.

In Smith v. State,[5] the accused, being a public ferryman, had transported across the ferry one B, with his horse and buggy. After B had debarked on the further side, the prisoner demanded the ferriage. B refused to pay, saying that he had already paid it. The accused then told B that he should not go on until he paid. Finally B paid the ferriage again. On the trial of the accused for false imprisonment of B, it appeared that the accused had not touched B, or any of his belongings, and that he had made no threat of personal violence; but B testified that he had paid the ferriage demanded because he did not want any difficulty with the defendant. In affirming a conviction on these facts, the court said: "Although the defendant did not take hold of the prosecutor, or offer violence to his person, yet his manner may have operated as a moral force to detain the prosecutor."

[4] 3 Sneed 66 (Tenn.).
[5] 7 Humph. 43 (Tenn.).

90. **Same subject—Force must be unlawful.**—The detention, to amount to false imprisonment, must be unlawful. Any imprisonment is unlawful which is done without sufficient authority and for which there is no justification. The law clothes the parent and teacher with certain authority to detain a child, therefore such detention, though against the will of the child, is not false imprisonment. If, however, the parent or teacher exceeds his authority, he is guilty of false imprisonment. An officer of the law has authority to arrest under certain circumstances, but if he exceeds his authority in arresting a person he has no right to arrest, or in arresting without a warrant in a case where a warrant is necessary, he is guilty of false imprisonment.

91. **Kidnapping.**—Kidnapping is the stealing and carrying away, or secreting, of a person. This crime is an aggravated form of false imprisonment. Kidnapping was a misdemeanor at common law. Recent statutes in the United States have made kidnapping, when done for the purpose of extorting money, a felony punishable by severe penalties.

CHAPTER XIV.

ABORTION AND RAPE.

92. **Abortion.**—Abortion, in itself, does not seem to have been a crime at common law. Life, in contemplation of the law, began only when the infant was able to stir in the mother's womb.[6] To cause the death of the child after the mother is thus quick, was always a crime, but it was a crime against the life of the child, not the crime of abortion.[7] Very generally, the destruction of the fœtus before quickening has been made a crime by statute. Statutes in most states also provide punishment for attempts to commit abortion, and for advertising or selling drugs to bring about abortion, or to prevent conception.

93. **Rape.**—Rape is defined as the carnal knowledge of a woman, forcibly and against her will.[8] Rape is a felony. This crime is generally defined by statute, some statutes following the definition given above, some substituting for the words "against her will" the phrase "without her consent," which has usually the same meaning.

Carnal knowledge. To constitute this element of the crime of rape, penetration alone is sufficient. The gist of the offense is the indignity to the woman,

[6] 1 Blackstone, Commentaries, p. 129.

[7] State v. Cooper, 22 N. J. L. 52; contra, Mills v. Commonwealth, 13 Pa. 631.

[8] 4 Blackstone, Commentaries, p. 210.

not the danger of impregnation, therefore emission need not be proven.

Capacity. Notwithstanding what has just been said, it was held at common law that a boy under fourteen years of age was conclusively presumed to be incapable of committing the crime of rape, and so could not be convicted therefor, even though he had in fact attained to puberty. This doctrine is generally followed in the United States. In some states, however, it is held that while a boy under fourteen is presumed to be incapable of committing this crime, such presumption may be rebutted by proof of his physical capacity.[9] In one state, Louisiana, it has been held that there is not even a presumption that a boy under fourteen is not capable of committing this crime.[10] There is no limit to the age of the woman on whom this crime may be committed. No female can be too young or too old to be subject to rape. The law protects all women from this crime, therefore a man may be convicted of rape on a prostitute as well as on the purest virgin.[11]

By husband. Since on marriage a woman consents to intercourse with her husband, a husband can never be guilty of rape on his wife by intercourse with her, whether she consents to such act at the time or not. The husband, however, may be guilty of rape as a principal in the second degree, on his own wife, as where he aids and abets another man to have intercourse with her without her consent.

94. **Same subject—Consent.**—The definition of

[9] Hiltabiddle v. State, 35 Ohio St. 52.
[10] State v. Jones, 39 La. Ann. 935.
[11] State v. Long, 93 N. C. 542.

rape requires that the intercourse be had either without the woman's consent, or against her will. Therefore, if the woman in fact consents to the intercourse there is no rape, though her consent be given with reluctance, or be obtained by false promises. Thus where A solicits B to intercourse, and B refuses, and A attacks B with intent to have intercourse with her by force, yet if before intercourse actually takes place B consents thereto, while A may be guilty of attempt to commit rape, he may not be convicted of rape itself. Nor is A guilty of rape if he obtained B's consent to intercourse only on promise of marriage, even though he does not marry her, nor intended to do so.

Fraud in obtaining consent. As a general rule a consent obtained by fraud is no consent. This is only true in a very narrow sense in rape. It is generally held that fraud to vitiate consent in rape must be fraud as to the act itself, not as to some collateral matter; or to put it another way, if the woman actually consents to the intercourse there is no rape, no matter how great the fraud used in obtaining her consent.[12] Thus in Regina v. Barrow,[13] the prisoner got into bed where the prosecutrix was and began having intercourse with her. She, thinking he was her husband, made no resistance. The prisoner having been convicted of rape, it was held on appeal that the conviction was wrong, as the act was done with the consent of the prosecutrix, though that consent was obtained only through the fraud of the prisoner in personating her husband.

[12] Don Moran v. People, 25 Mich. 356, LEADING ILLUSTRATIVE CASES.
[13] 11 Cox C. C. 191 (Eng.).

95. **Same subject—Another view.**—A different conclusion was arrived at in Ireland on a similar state of facts, in Regina v. Dee.[14] In this case the court said: "Rape being defined to be sexual connection with a woman without her consent, or without and therefore against her will, it is essential to consider what is meant and intended by consent. Does it mean an intelligent, positive concurrence of the will of the woman, or is the negative absence of dissent sufficient? In these surgical cases it is held that the submission to an act believed to be a surgical operation does not constitute consent to a sexual connection; being of a wholly different character, there is no *consensus quoad hoc* (consent to the thing itself). In the case of personation there is no *consensus quoad hoc personam* (consent as to the person). Can it be considered that there is a consent to the sexual intercourse, it being manifest that, had it not been for the deceit or fraud, the woman would not have submitted to the act? In the case of idiocy, of stupor, or of infancy, it is held that there is no legal consent from the want of an intelligent and discerning will. Can a woman, in the case of personation, be regarded as consenting to the act in the exercise of an intelligent will? Does she consent, not knowing the real nature of the act? * * * She intends to consent to a lawful and marital act, to which it is her duty to submit. But did she consent to an act of adultery? Are not the acts themselves wholly different in their moral nature? The act she committed cannot properly be regarded as

[14] 15 Cox C. C. 579 (Eng.).

the real act which took place. Therefore the connection was done, in my opinion, without her consent, and the crime of rape was committed."

A statute was later passed in England making intercourse obtained by personating the husband, rape. Similar statutes are in force in some of our states. In Don Moran v. People,[15] a physician obtained consent to intercourse with a patient by fraudulently representing to her that such intercourse was a necessary part of his medical treatment of her. This was held not to amount to rape, as the patient consented to the intercourse. On the other hand, where a physician had intercourse with a patient, she believing, as she said, that he was treating her medically, it was held that the physician was guilty of rape. In this case the woman did not consent to an act of intercourse at all, but only to medical treatment.[16]

96. **Same subject—Incapacity to consent.**—If for any reason a woman is incapable of consenting to carnal intercourse, such intercourse with her is rape, even though she does not oppose it, or even if she actually consents to it. Thus, intercourse with a woman who is insensible from drink, or drugs,[17] or who is asleep when penetration is effected,[18] is rape. Likewise carnal knowledge of an idiot or imbecile is rape, at least if the man knew her mental condition and that she was not consenting at the time of the intercourse.[19] But not every intercourse with a

[15] 25 Mich. 356, LEADING ILLUSTRATIVE CASES.
[16] Regina v. Case, 4 Cox C. C. 220 (Eng.).
[17] Regina v. Camplin, 1 Cox C. C. 220 (Eng.).
[18] Payne v. State, 40 Tex. Cr. App. 202.
[19] State v. Tarr, 28 Iowa 397.

woman of unsound mind is rape; though of weak mind, yet if she is capable of exercising her will sufficiently to control her actions and to understand the nature of the act, and acquiesces in the intercourse, such intercourse is not rape. The rule is thus stated in State v. Tarr:[20] "If a man knowing the woman to be insane or idiotic, should take advantage of that fact to have knowledge of her person, while her mental powers were so impaired that she was unconscious of the nature of the act, or was not a willing participator, the act would be rape, though distinct proof of opposition might be wanting. And this would be the more incontrovertibly true if there was nothing in her conduct indicating even an animal desire for the connection."

Intercourse with children. Female children under a certain age are considered incapable of consenting to carnal intercourse, and such intercourse with them is rape, whether they in fact consent or not. The age under which a female cannot consent is fixed by statute, and differs in different jurisdictions. It varies from the age of ten years to eighteen.

Consent obtained by threats. The consent which negatives the crime of rape must be a voluntary consent. If the consent is obtained by threats of death or of bodily harm, such consent will not bar a prosecution for rape.[21]

97. **Doctrine of resistance.**—The doctrine as to the amount of resistance that must be made by the woman is well expressed by Park, C. J., in State v.

[20] 28 Iowa 397.

[21] Wright v. State, 4 Humph. 194 (Tenn.).

Shields.[22] He says: "While it may be expected in such cases from the nature of the crime that the utmost reluctance would be manifested and the utmost resistance made which the circumstances of the particular case would allow, still, to hold as matter of law that such manifestation and resistance are essential to the existence of the crime, so that the crime could not be committed if they were wanting, would be going farther than any well-considered case in criminal law has hitherto gone. Such manifestation and resistance may have been prevented by terror caused by threats of instant death, or by the exhibition of brutal force which made resistance utterly useless; and other causes may have prevented such extreme opposition and resistance. * * * If the failure to make extreme resistance was intentional in order that the assailant might accomplish his purpose, it would show consent; but without such intent it shows nothing important whatsoever."

[22] 45 Conn. 256.

CHAPTER XV.

HOMICIDE.

98. **Several kinds of homicide.**—Homicide, which is the killing of any human being, is of three kinds: justifiable, excusable and felonious.

Justifiable homicide. Justifiable homicide is such a killing as is commanded or permitted by the law for the advancement of public justice, as where the sheriff hangs a person lawfully condemned to die; or where an officer or private person kills a person as the only means of preventing that person committing some atrocious crime, or in arresting him, or preventing his escape.

No penalty is attached to this kind of homicide.

Excusable homicide. Excusable homicide is of two kinds: (1) where the killing is *per infortunium* (by misadventure); (2) where it is *se defendendo* (in self-defense). Homicide by misadventure is where a man, doing a lawful act, without any intention of hurt, and without negligence, unfortunately kills another; as where a man is at work with a hatchet and, due to no negligence of his, the head thereof flies off and kills a by-stander, or where, without negligence, a hunter unintentionally kills his companion, or where a parent while moderately chastising his child unintentionally causes the child's death. Homicide in self-defense is where a person without fault kills his antagonist in necessary or apparently neces-

sary self-defense. We have already discussed this kind of homicide in a previous chapter. Excusable homicide was originally punished by forfeiture of goods, but no distinction is now made between excusable and justifiable homicide. Neither is punishable.

Felonious homicide. Felonious homicide is the killing of a human being without justification or excuse. It is divided into murder and manslaughter. Felonious homicide may be committed either on one's self or on another.

99. **Suicide.**—Suicide was murder at common law, and such punishment as could be inflicted in view of the fact that the actor was dead, was meted out. The suicide's goods were forfeited, and his body buried with a stake driven through it. Since forfeiture of goods for crime has been abolished, and ignominious burial has become obsolete, some courts have held that suicide itself has ceased to be a felony. This view has also received legislative sanction.[23] Suicide is still regarded in some jurisdictions as a crime, and therefore the attempt to commit it is a crime.[24] So, where it is recognized as a crime, the aiding and abetting another to commit it is likewise a crime.[25] On the same principle, one who in the attempt to commit suicide causes the death of another person is guilty of homicide, on the doctrine of constructive intent.[26]

[23] See N. Y. Penal Code; May v. Pennell, 101 Me. 516.

[24] State v. Carney, 69 N. J. L. 478.

[25] McMahan v. State, 53 So. 89 (Ala.).

[26] State v. Levelle, 34 S. C. 120; contra, Grace v. State, 69 S. W. 529 (Tex.).

100. **The act causing death.**—It has been said that there are as many ways to commit murder as there are to destroy a man; therefore no particular kind of act is necessary to constitute this element of the crime of murder. It is sufficient if the act done results in death. Such was the case of the man who carried his sick father against his will in cold weather from one town to another, by reason whereof he died, and of the harlot who placed her child in an orchard where it was struck and killed. Hawkins says: "In some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another, or by himself; as where one by duress or imprisonment compels a man to accuse an innocent person, who on his evidence, is condemned and executed, or where one incites a madman to kill himself or another; or where one lays poison with an intent to kill one man, which is afterwards accidentally taken by another who dies thereof."[27] So if one frighten a horse on which another is riding so that the horse throws him and he is killed; or if he assault another who is on horseback and that other to avoid the attack spur his horse which thereupon throws him; or where a husband assaults his wife, who in order to escape him, jumps from a window and is killed by the fall.[28] In all these cases the person whose act brought about the result is guilty of homicide.

101. **Neglect—Causing death.**—Death may be caused by omitting to act as well as by acting. If

[27] Hawkins, Pleas of the Crown, ch. 13 (Eng.).

[28] Regina v. Donovan, 4 Cox C. C. 401 (Eng.). Compare Commonwealth v. Campbell, 7 Allen 541 (Mass.), LEADING ILLUSTRATIVE CASES.

one be under a legal duty to provide food, clothing or medicine for another, and neglect to do so, he is responsible for the resulting death. Thus where a woman was delivered of a child by night on the roadside and left it there without any clothing to protect it from the weather, and it died of the cold, Coltman, J., told the jury: "If a party so conduct himself with regard to a human being which is helpless and unable to provide for itself, as must necessarily lead to its death, the crime amounts to murder." [29] In order that one may be guilty of homicide by neglect, however, it must be shown that the person accused was under a legal duty to do the acts the neglect of which caused the death. Thus in Regina v. Edwards,[30] the indictment charged that A, a woman, neglected to provide food for X, a child of three months, thus causing the death of the child. The court held that as the indictment did not allege that A was the mother of X, or in any way show that A was under any duty to supply X with food, A could not be convicted.

102. **Concurring acts or omissions.**—If one cause the death of another he is none the less liable because the acts of a third person contributed to the death. In Regina v. Benge,[31] the defendant, who was repairing a railroad track, took up the rails within too short an interval of time before the arrival of a train. He sent a flagman back, but not far enough. The engineer of the train was not keeping a sufficient lookout, which prevented him from seeing the

[29] Regina v. Walters, C. & M. 164 (Eng.).
[30] 8 C. & P. 611 (Eng.).
[31] 4 F. & F. 504 (Eng.).

flagman in time to stop the train. On an indictment of the defendant for manslaughter, the court said: "Assuming culpable negligence on the part of the prisoner which materially contributed to the accident, it would not be material that others also by their negligence contributed to cause it." It is on this principle that the negligence of a wounded person in failing to have the wound treated, does not relieve the person who gave the wound, if the wound in fact caused death.[32]

103. **Distinction between cause and condition.**—A distinction must be made between being the cause of death and furnishing a condition from which death results through the operation of some cause. Thus while one giving a wound is guilty, as we have seen, notwithstanding the negligence on the part of the person wounded, yet if the person wounded does not die of the wound but his death is directly due to the treatment of the wound, the wound being itself not mortal, the person giving the wound is not liable for the death, for the wound was not the cause of the death, but only the condition.[33] Lord Hale states the rule substantially as follows: (1) If one gives another a dangerous wound which might by skilful treatment be cured, but is not cured, it is a case of homicide. (2) If one inflicts a dangerous wound, and the wounded man dies from the treatment, if it clearly appears that the treatment and not the wound was the cause of death, it is not homicide. (3) If one inflicts a wound not in itself mortal, and fever or

[32] Rew's Case, Kel. 26 (Eng.).
[33] See Parsons v. State, 21 Ala. 300.

gangrene sets in because of improper treatment or unruly conduct of the patient, and death ensues, it is homicide. (4) One who hastens the death of a person languishing with a mortal disease is guilty of a homicide, for the death is not merely a visitation of Providence, but the act hastens it, and the wrongdoer cannot thus apportion the responsibility.[34]

104. **Same subject—Wound and disease.**—In Bush v. Commonwealth,[35] the doctrine is thus stated by Hines, J., in a trial for murder in which it appeared that the deceased had been given a wound not necessarily mortal, and in consequence was taken to a hospital where, through the negligence of a physician, she contracted scarlet fever, of which she died: "When the disease is a consequence of the wound, although the proximate cause of the death, the person inflicting the wound is guilty, because the death can be traced as a result naturally flowing from the wound and coming in the natural order of things; but where there is a supervening cause, not naturally intervening by reason of the wound, and not produced by any necessity created by the wound, the death is by visitation of Providence, and not from the act of the party inflicting the wound. In the case under consideration the fever was not a natural consequence of the wound, nor was it produced by any necessity created by the infliction of the wound. It did not render it necessary to have the wound treated by a physician just recovering from scarlet fever, even if it be conceded that med-

[34] 1 Hale, Pleas of the Crown, p. 428 (Eng.).
[35] 78 Ky. 268.

ical treatment was necessary at all. If the death was not connected with the wound in the regular chain of causes and consequences, there ought not to be any responsibility. If a new and wholly independent instrumentality interposed and produced the death, it cannot be said that the wound was the natural or proximate cause of the death."[36]

105. **Same subject—Wounds independently inflicted.**—In People v. Lewis,[37] the defendant shot the deceased in the abdomen, inflicting a mortal wound, from which death would have ensued within one hour. The deceased went into the house, seized a knife, and cut his own throat, giving himself a wound which it was testified would have caused his death in five minutes. Some of the medical witnesses thought that death was accelerated by the knife wound, some that the knife wound was the cause of the death. The prisoner contended that he was not guilty of homicide, in that the wound inflicted by him was not the cause of the death, but only the condition. The court said: "I think the jury were warranted in finding that it was [the cause of the death], but if the deceased did die from the effect of the knife wound alone, no doubt the defendant would be responsible, if it was made to appear, and the jury could have found from the evidence, that the knife wound was caused by the wound inflicted by the defendant in the natural course of events. If the relation was causal, and the wounded condition of the deceased was not merely

[36] Compare Commonwealth v. Hackett, 2 Allen 136 (Mass.), LEADING ILLUSTRATIVE CASES.

[37] 124 Cal. 551.

the occasion upon which another cause intervened, not produced by the first wound or related to it in other than a casual way, then defendant is guilty of a homicide.

"But if the wounded condition only afforded an opportunity for another unconnected person to kill, defendant would not be guilty of a homicide, even though he had inflicted a mortal wound. * * * But why is it that one who inflicts a wound not mortal is guilty of a homicide, if through misconduct of the patient or unskilful treatment, gangrene or fever sets in, producing a fatal termination—when, if it can be clearly made to appear that the medicine and not the wound was the cause of the death, he is not guilty of a homicide? In each case if the wound had not been, the treatment would not have been, and the man would not have died. In each case the wound occasioned the treatment which caused or contributed to the death. The reason, I think, is found in the words advisedly used in the last sentence. In the one case the treatment caused the death and in the other it merely contributed to it. In the one case the treatment aggravated the wound, but the wound thus aggravated produced death. In the other the wound, though the occasion of the treatment, did not contribute to the death, which occurred without any present contribution to the natural effect of the medicine from the wound. Here when the throat was cut Farrel was not merely languishing from a mortal wound, he was actually dying —and after the throat was cut he continued to languish from both wounds. Drop by drop the life

current went out from both wounds, and at the very instant of death, the gunshot wound was contributing to the event. If the throat-cutting had been by a third person, unconnected with the defendant, he might be guilty, for though a man cannot be killed twice, two persons, acting independently, may contribute to his death, and each be guilty of a homicide. A person dying is still in life, and may be killed, but if he is dying from a wound given by another, both may properly be said to have contributed to his death."

106. **The person killed.**—The person killed must be "a reasonable creature in being." To kill a child while in its mother's womb is not homicide. The child must be fully born at the time of its death. Therefore where a woman during childbirth, when all of the body of the child except its head was still in her body, cut off the head, this was held not to be murder. If the child is fully born, however, the fact that it has not yet breathed, or the umbilical cord has not been cut, will not prevent the killing from being homicide.[38] The blow which causes the death need not be inflicted after the birth. If the child be born alive and dies by reason of blows it received while in the womb, this will be murder in him who gave the blows.

[38] State v. Winthrop, 43 Iowa 519, LEADING ILLUSTRATIVE CASES.

CHAPTER XVI.

MURDER.

107. **Elements of the crime.**—Murder is defined to be the unlawful killing of a reasonable creature in being, with malice aforethought. What acts of the accused will make him responsible for the killing have been noted. It remains to determine the mental element of this crime, which is described as "malice aforethought." The word "malice" as used in this definition is a technical expression and is not to be taken in the common sense of that word. In common use, malice means a settled anger against a person, a desire for revenge. But in the definition of murder it means a "frowardness of mind," a wicked, depraved, malignant spirit, "a heart regardless of social duty and fatally bent on mischief."[39] Malice is said to be either express or implied by law. Express malice is where one with a sedate, deliberate mind and formed design, kills another, as shown by lying in wait, antecedent threats, former grudges and concerted plans to do the person killed grievous bodily harm or to kill him. Malice is said to be implied where the killing happens in the execution of some other unlawful action, there being no intention of killing or of causing bodily harm to the person killed. Other writers express the distinction differently.[40]

[39] State v. Smith, 2 Strob. 77 (S. C.), LEADING ILLUSTRATIVE CASES.

[40] See Wharton, Homicide (3rd ed.), § 83; Russell, Crimes (7th ed.), p. 656; May, Criminal Law (3rd ed.), § 221.

The distinction, however, is unimportant, at common law the crime being the same in either case.

108. **Intent to kill.**—In order to have a killing with malice, it is not necessary that there be a specific intent to kill the person slain, or another. There is malice if there be either an intent to kill or an intent to do serious bodily harm without excuse, justification or provocation. Thus where a park keeper tied a boy, who was stealing wood, to a horse's tail, and struck the horse, so that the boy was dragged and killed, this was held to be murder, though it did not appear that the keeper intended the death of the boy. The act was a cruel and wanton one, the boy making no resistance, and showed a cruel and malignant spirit, and an intent to do serious harm.[41] So when a school master, in correcting a pupil, stamped on his belly causing death, this was murder, though no intent to kill, because the correction was not only excessive but done in such a manner as to show a malignant disposition.[42]

If one shoot into a crowd and kill a person, this is murder though he did not specifically intend to kill any particular individual, for the act shows the wickedness of disposition, a recklessness of consequences, which is malice. So if one intentionally use a deadly weapon on another, as where he shoots at another, or stabs him, or strikes him with any weapon likely to cause death, and death ensues, it is murder, whether there was any intent to kill or not. If, however, the weapon used is one not likely to

[41] Halloway's Case, Cro. Car. 131 (Eng.).
[42] 4 Blackstone, Commentaries, p. 199.

cause death or serious bodily harm, but death accidentally results, the killing is not murder, but manslaughter only.[43] Thus in Wild's Case,[44] Wild, finding an intruder in his house, ordered him out, and on his refusing to leave, Wild resorted to force and, by a kick which he gave the intruder, caused an injury which resulted in death. This was held manslaughter. There was no intention to kill, and the act of kicking, while unlawful, was not such an act as was likely to result in death or serious harm.

109. **Killing in commission of a felony.**—One of the meanings of malice aforethought is killing of a person by one engaged in the commission of felony. Wherever a man happens to kill another in the execution of a deliberate purpose to commit any felony, he is guilty of murder; as where a person shooting at tame fowl, with an intent to steal them, accidently kills a man, or where one sets upon a man to rob him, and kills him in making resistance, or where a person shooting at or fighting with one man, with a design to murder him, misses him and kills another man. This doctrine has been generally followed by the courts, and it has often been held that a killing accidentally done by one in the commission of arson, robbery, burglary or rape, is murder. There is a tendency of late to restrict the common law rule somewhat; to hold that not every accidental killing done in the commission of any felony will be murder, but only a killing done in the commission of the more serious felonies. It is said that an unlawful

[43] Wellar v. People, 30 Mich. 16, LEADING ILLUSTRATIVE CASES.
[44] 2 Lew. C. C. 214 (Eng.).

act, to make a killing pursuant thereto murder, should be such only as tends to the injury of another either as an immediate or as a necessary consequence. To render a killing accidentally done in the commission of another crime a murder, the crime in which the person killing was engaged must be a felony. If it is only a misdemeanor the resulting death will not be murder, but only manslaughter.

110. **Killing an officer.**—Ministers of justice while in the execution of their office are under the peculiar protection of the law, and if such officer be killed by one obstructing him in performing his duty, such killing is murder, even though unintentional. A private person suppressing an affray, preventing a felony, or lawfully arresting a felon, is under the same protection, and a killing of such person is likewise murder.[45] The officer or private person must, however, be acting under legal authority, for, if the arrest be illegal, the person arrested has the right to resist and if in such resistance he kills the party arresting, in the heat of blood caused by the arrest, such killing will be at most manslaughter, and if done in self-defense will be excusable.

111. **Killing through neglect of duty.**—Where one is under a legal duty to act, a failure to perform the duty is as culpable as the doing of a wrongful act. If the omission to act causes the death of a person and was done with that object, it will constitute murder. Thus if a parent wilfully withhold food from a dependent child unable to supply its own necessities, with intent to starve the child, the re-

[45] 4 Blackstone, Commentaries, p. 200.

sulting death would amount to murder.[46] So where it was the duty of a miner to ventilate a mine, and he neglected to do it, and thus caused an explosion which resulted in the death of a person, it was held that if the death was intended it was murder.[47]

112. **Degrees of murder.**—At common law the punishment for murder was death. But, in more recent times, it being considered that while some murderers are deserving of death, other killings, though within the definition of murder, are less heinous, statutes have been passed dividing common law murder into degrees, making different punishments applicable to the different degrees. These statutes vary in their terms, but they all agree in dividing this crime into two degrees. Murder in the first degree is, in general, the common law murder when committed with premeditation and deliberation, or a killing done in the commission of or in the attempt to commit arson, robbery, burglary or rape. Murder in the second degree is held to be all murder at common law that is not murder in the first degree. When a killing is shown to have been done, the presumption is that it amounts to murder in the second degree. To convict of murder in the first degree the burden of proof is on the state to show that the killing was done with premeditation and deliberation. Therefore any facts which negative deliberation or premeditation will make the killing only murder in the second degree, at most. Implied malice is sufficient at common law to make the offense of

[46] Regina v. Conde, 10 Cox C. C. 547 (Eng.).
[47] Regina v. Lowe, 4 Cox C. C. 449 (Eng.).

killing a murder, and under the statutes to make it murder in the second degree, but not in the first degree.

We have seen that, in general, intoxication is no defense at common law to a charge of murder. It is likewise, in general, no defense to a charge of murder in the second degree. On an indictment for first degree murder, however, proof of intoxication to a degree adequate to prove that the accused did not have sufficient mastery of his faculties to deliberate and premeditate the killing, will prevent a conviction for murder in the first degree.[48] In proving the premeditation and deliberation necessary to constitute murder in the first degree, it is not necessary to prove that the accused premeditated or deliberated on the killing for any definite length of time. It has been said that no time is too short for the human mind to deliberate and premeditate, and it is sufficient to make murder in the first degree if these operations of the mind were accomplished when the blow was struck. Yet suddenness of action is opposed to the idea of premeditation and deliberation, and should be considered by the jury in reaching a conclusion as to whether the crime of the defendant was murder in the first degree.

[48] Hopt v. People, 104 U. S. 631, LEADING ILLUSTRATIVE CASES.

CHAPTER XVII.

VOLUNTARY MANSLAUGHTER.

113. **Elements of the crime.**—Manslaughter is defined to be the unlawful killing of another without malice aforethought. The distinction between murder and manslaughter, therefore, is that the one is done with malice and the other without. Manslaughter is of two kinds: (1) voluntary; (2) involuntary. Voluntary manslaughter at common law is an unlawful and intentional homicide in sudden passion or heat of blood, caused by what the law regards as legal provocation.[49] The law regards a killing done under adequate provocation as less culpable than one done without provocation, because the provocation for the time being excludes from the mind of the actor that cruelty which is the earmark of murder, through the controlling presence of a natural rage immediately induced by the injury. Provocation is defined to be such conduct or actions on the part of one person towards another as tend to arouse rage, resentment or fury in the latter against the former, and thereby cause him to do some illegal act against or in relation to the person offering the provocation.

114. **Words and gestures as a provocation.**—It was laid down generally by the older writers on the criminal law that no words of reproach, insult or

[49] People v. Freel, 48 Cal. 436, LEADING ILLUSTRATIVE CASES.

infamy, or gestures, are sufficient provocation to reduce an intentional killing from murder to manslaughter. In Rex v. Dangerfield,[50] B had been flogged from Newgate to Tyburn for a libel. As he was returning A asked him in a jeering manner whether he had run his heat; B replied in insulting language, whereupon A struck him in the eye with his cane, causing his death. This was held murder.

As insulting language is not a sufficient provocation when addressed to the person killing, so neither when used about him to another person, even though the language accuse him of a crime. But in some jurisdictions it has been held that words may be sufficient provocation to reduce a killing to manslaughter. In Rex v. Rothwell,[51] R was indicted for the murder of his wife. Blackburn, J., in charging the jury said: "As a general rule of law no provocation of words will reduce the crime of murder to manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband, suddenly hearing from his wife that she had committed adultery, and he having no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter. Now in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: 'Aye; but I'll take no more for thee, for I will have no more children of thee. I have done it once and I'll do it again.' Now, what you will have to consider is, would these words, which were spoken

[50] 3 Mod. 68 (Eng.).
[51] 12 Cox C. C. 145 (Eng.).

just previous to the blows, amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did?" The trend of decisions is in accord with this case.

115. **Words in connection with conduct as a provocation.**—In Seals v. State,[52] S was indicted for murder. The trial court instructed the jury that it mattered not how obscene the language of the deceased was, or how vexatious his conduct might have been, these would not reduce a killing with a deadly weapon to manslaughter. The supreme court held this instruction to be erroneous, saying: "It ought to have been left to the jury to determine under proper instructions, whether the obscene language of the deceased, used in presence of the defendant's family, and at his table, in connection with his vexatious conduct, was calculated to produce such excitement and passion as would obscure the reason of an ordinary man, and induce him, under the excitement and passion so produced, to strike the blow, and whether in fact the blow was stricken in consequence of the heat of passion so produced." In some states, statutes have been passed making insulting words or conduct toward a female relative sufficient provocation to reduce a killing to manslaughter. Under such statutes it is sufficient if the language was insulting, whether the female felt insulted by it or not. Under some statutes the insulting language need not be used in the presence of either the female or the

[52] 3 Baxt. 459 (Tenn.).

slayer; it is sufficient if the latter was informed of it and killed at his first meeting with the utterer.[53]

116. **Assault or battery as a provocation.**—It is said by Blackstone that if a man be greatly provoked, as by pulling his nose or other great indignity, and immediately kill the aggressor, this is but manslaughter on account of the provocation.[54] And it is laid down in Regina v. Mawgridge,[55] that "if one man upon angry words, shall make an assault upon another, either by pulling him by the nose or filliping upon the forehead, and he that is so assaulted shall draw his sword, and immediately run the other through, that is but manslaughter; for the peace is broken by the person killed, and with an indignity to him that received the assault. Besides, he that was so affronted might reasonably apprehend that he that treated him in that manner might have some further design upon him."

But not every assault will be sufficient to reduce a killing from murder to manslaughter; the assault, to have this effect, must be one calculated to produce anger. In Stedman's Case,[56] there being an affray in the street, S, a soldier, ran hastily towards the combatants. A woman seeing him run in that manner, cried out, "You will not murder the man, will you?" S replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and S struck her on the breast with the

[53] Hudson v. State, 6 Tex. App. 565; Orman v. State, 22 Tex. App. 604; Doss v. State, 43 Tex. Cr. App. 551.

[54] 4 Blackstone, Commentaries, p. 191.

[55] Kel. 119 (Eng.).

[56] Fost. 292 (Eng.).

pommel of his sword. The woman then fled; and S, pursuing her, stabbed her in the back. Holt, C. J., thought that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in such a manner, after S had given her a blow in return for the box on the ear. But it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, the killing was held to be no more than manslaughter, as the smart of the man's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the killing. In State v. Anderson,[57] the court said: "It is not every assault that is deemed sufficient in law to mitigate a killing by a person assaulted, to the grade of manslaughter. Merely shaking a finger in the face of another, or touching his face with his finger, or laying a hand on his collar or breast, cannot be deemed an attempt to commit a serious personal injury on the person touched. Neither is a refusal to pay a debt, whether justly due or not, to be deemed such a serious and highly provoking injury as to be sufficient to excite an irresistible passion in the mind of a reasonable person." On the other hand, the assault need not be such as to endanger life, to reduce the killing to manslaughter.

117. **Adultery as a provocation.**—If a husband discover his wife in adultery and immediately kill either the wife or her paramour in the heat of passion caused by their conduct, the killing will be only

[57] 4 Nev. 265.

manslaughter. This is on the ground that a killing under these circumstances, committed under the natural anger induced by so gross an outrage, lacks the malice necessary to murder. It has been held that this rule is applicable only in the case of the wife, and that one who kills a man whom he detects in adultery with his sister, is guilty of murder.[58] It is generally said that to make the killing by a husband of the wife's paramour manslaughter, he must detect them in the very act of adultery, but this has been denied by some courts. In Duthey v. State,[59] the wife of the defendant had eloped but had returned and become reconciled to her husband. Later she was seen by the husband with the person with whom she had eloped, under circumstances that led the husband to believe they were ridiculing him. The court said: "The sight of the man himself on this day, and especially the sight of him and the wife about 5 o'clock in the afternoon, flaunting their intimacy in public, and, as he believed, accompanying it with signs and conduct of ridicule of himself, were all events which might well produce that blind anger which the law calls heat of passion."

118. **Trespass as a provocation.**—A trespass upon a man's goods, or on his lands, is not such provocation as to make an intentional killing of the trespasser manslaughter. In Commonwealth v. Drew,[60] the deceased unlawfully forced open the door of the defendant's shop, whereupon the defendant in a great passion caught up a sledge hammer and with

[58] Lynch v. Commonwealth, 77 Pa. 205.
[59] 10 L. R. A. (N. S.) 1032 (Wis.).
[60] 4 Mass. 391.

it struck the deceased, killing him. On an indictment for murder, the court said: "If the jury were satisfied that the instrument of death was a deadly weapon which would probably kill the deceased or do him great bodily injury, * * * the provocation arising from the trespass committed by the deceased in breaking open the shop door, for the purpose of unlawfully entering, was not a provocation sufficient to reduce the killing below the crime of murder; * * * because the trespass was not a sufficient excuse for such a barbarous act. For it is a rule of law that where the trespass is barely against the property of another, not his dwelling house, it is not a provocation sufficient to warrant the owner in using a deadly weapon; and if he do, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the degree of the provocation; but if the beating be with an instrument, and in a manner not likely to kill, and the trespasser should, notwithstanding, happen to be killed, it will be no more than manslaughter," providing, of course, there was no intent to kill.

We have seen that the law allows one to protect his property and the possession of his premises from invasion by the use of such force as is necessary, short of putting life in danger. Therefore, if in the exercise of such force only, the intruder is accidentally killed, such killing is neither murder nor manslaughter, but excusable homicide. So, as we have seen, if, in lawfully repelling such invasion, the invader puts the owner's life in danger, the owner may kill in self-defense.

119. **Other circumstances rebutting malice.**—Other circumstances showing that the killing by the defendant was not done through malice, but in heat of blood induced by provocation, will reduce the killing from murder to manslaughter. Thus, in Noble v. State,[61] the court said: "Where an assault, which is neither intended nor calculated to kill, is returned by violence beyond what is proportionate to the aggression, the character of the combat is changed; and if, without time for his passion to cool, the assailant kills the other, he commits only manslaughter." Illegal arrest of one's self or one's friend may be such provocation as to reduce a killing to manslaughter. In Huggett's case,[62] A and others, in the time of the Dutch war, without any warrant, impressed B to serve the king at sea. B quietly submitted, and went off with the press masters. Huggett and the others pursued them and required a sight of their warrant; but they showed a piece of paper that was not a sufficient warrant. Thereupon, Huggett, with the others, drew their swords, and the press masters theirs, and there was a combat, and those who endeavored to rescue the pressed men killed one of the pretended press masters. This was held to amount to but manslaughter. For, it was said, when the liberty of one subject of the king was invaded, it affected all the rest, and amounted to a legal provocation.

120. **Killing in mutual combat.**—East says: "There is another class of cases, where the degree

[61] 87 S. W. 120 (Ark.).
[62] Kel. 59 (Eng.).

or species of provocation enters not so deeply into the merits of them as in the foregoing: and those are, where, upon words of reproach, or indeed any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being taken or sought on either side: if death ensue, this amounts to manslaughter. And here it matters not what the cause be, whether real or imagined, or who draws or strikes first: provided the occasion be sudden, and not urged as a cloak for pre-existing malice." To reduce a killing to manslaughter, even when the killing was done in mutual combat, it must appear that the contest was waged upon equal terms, and no undue advantage taken by the accused; if undue advantage was taken, malice may be inferred and the killing amount to murder. Thus, in State v. Kloss,[63] a dispute arose between an aged cripple and a young, vigorous man, the former shoving the latter and raising his hand as if to strike him, whereupon the young man knocked the cripple down and stamped on him, causing his death. The court held this was murder, saying: "If these touching incidents of soul-sickening barbarity and brutal ferocity do not make out a case of 'a heart regardless of social duty and fatally bent on mischief,' then it is needless to consult the authorities in order to discover what kind of a heart that is."

121. **Passion, or hot blood.**—Not only must there be sufficient provocation to reduce a killing from murder to manslaughter, but the killing must be done as a result of the provocation and while the

[63] 117 Mo. 591.

defendant is in a transport of passion induced by the provocation. No matter how great the provocation, if the defendant is not in fact put in a passion by it, but kills in cold blood, or out of revenge, the killing is murder, not manslaughter. So, though the accused was put into a passion by the provocation, if he do not kill until after his passion has subsided, it is not manslaughter, but murder. Therefore, in the cases put above, if the husband do not kill the adulterer until after his passion has cooled; or in case of assault, if the parties fix a later day to fight and one is killed, this is murder. Any circumstances that show that the killing was the result of deliberation and not of the heat of blood, will make the killing murder. So, if there was a previously formed design to kill, the fact that the killing was done in the heat of passion will not reduce the crime to manslaughter.

122. **Kinds and degree of passion.**—*Kinds.* Passion which will reduce a killing from murder to manslaughter may be either anger or fear. We have seen that one who kills another from a reasonable fear that the other is about to take his life, can successfully plead that the killing was done in self-defense. It seems that if the killing is done through fear not so reasonable as to come within this rule it may yet serve to reduce the killing to manslaughter.[64]

Degree. The degree of the passion under which the accused is laboring when the killing is done need not be such as to make him insane, or uncon-

[64] United States v. King, 34 Fed. 302.

scious of what he is doing; it is sufficient if it disturbs the sway of his reason and makes him regardless of its admonitions. "All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which, during the *furor brevis* (sudden passion), renders a man deaf to the voice of reason, so that, though the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity."[65]

123. **Cooling time.**—In every case of homicide, how great soever the provocation may have been, if there be a sufficient time for the passion to subside and for reason to interpose, such homicide will be murder. Therefore, in the case of the adulterer, before mentioned, if the husband kill him deliberately and in revenge, and after sufficient cooling time, the provocation will not avail in alleviation of the guilt. With respect to what interval of time shall be allowed for passion to subside, it is much easier to lay down rules for determining what cases are without the limits, than how far exactly those limits extend. It must be remembered that in these cases the immediate object of inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given: for, if from any circumstances whatever it appear that the party reflected, deliberated, or cooled, any time before the fatal stroke given, or if in legal presumption there was time or opportunity for cooling, the

[65] Gaston, J., in State v. Hill, 4 Dev. & Bat. 491 (N. C.).

killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty.

There must be taken into consideration the nature of the provocation, the prisoner's physical and mental constitution, his condition in life, and his peculiar situation at the time of the killing, his education and habits, his conduct, manner and conversation throughout the transaction—in a word, all pertinent circumstances; and the time in which an ordinary man, in like circumstances, would have cooled, is the reasonable time which the law requires.[66] In some jurisdictions, whether a reasonable time has elapsed for cooling is a question of law for the court to decide. In other jurisdictions it is a question of fact for the jury.

[66] State v. McCants, 1 Spear 384 (S. C.).

CHAPTER XVIII.

INVOLUNTARY MANSLAUGHTER.

124. **Elements of the crime.**—Involuntary manslaughter is an unintentional homicide committed by one without justification or excuse, but without malice aforethought.[67] Involuntary manslaughter may result from (1) the doing of an unlawful act not amounting to a felony, nor calculated to cause death or serious bodily injury; (2) the doing of a lawful act negligently; (3) the negligent omission to do some act that one is under a legal duty to do.

125. **Killing in the prosecution of an unlawful act.**—Where one engaged in the doing of an unlawful act amounting to a felony, accidentally kills a human being, this, we have seen, makes him, the actor, guilty of murder. If the act he is engaged in when the homicide occurs is not a felony, but a misdemeanor, he is guilty of the lesser crime of manslaughter, unless, indeed, the misdemeanor is one intended to cause serious bodily harm, in which case the law implies malice. Thus, a killing in the course of a prize fight, where such fights are unlawful, is manslaughter, while a killing in a duel

[67] Other definitions are: "Where a man doing an unlawful act, not amounting to a felony, by accident kills another." State v. Abarr, 39 Iowa 185. "Where any person shall unlawfully kill any human being, without malice express or implied, involuntarily, but in the commission of some unlawful act." Bruner v. State, 58 Ind. 159.

would be murder. In Regina v. Towers,[68] Towers caught a woman by the hair and struck her. She screamed, and this so frightened an infant that she held in her arms that it died in convulsions. On an indictment for manslaughter, Denman, J., told the jury that the prisoner committed an unlawful act—an assault and battery on the woman—and that if that act caused the death of the child they might find Towers guilty of manslaughter. So, in Fray's case,[69] where Fray, having his pocket picked, seized the offender and threw him into a pond nearby, intending to duck him, but not intending to take his life or do him serious bodily harm. This was held to be manslaughter, as the act of throwing him into the pond was a wrongful act.

126. **Killing in games.**—A game, so called, may be unlawful per se (in itself), or it may be in itself lawful, but be played in an unlawful manner. In either case a killing done in playing the game may be manslaughter. Thus, where a person engaged in the old English game of cock-throwing accidentally killed another, it was held manslaughter.[70] As said by Endicott, J., in Commonwealth v. Collberg:[71] "The common law recognizes as not necessarily unlawful certain manly sports calculated to give bodily strength, skill, and activity, and 'to fit people for defense, public as well as personal, in time of need.' Playing at cudgels or foils, or wrestling by consent, there being no motive to do bodily harm on either

[68] 12 Cox C. C. 530 (Eng.).
[69] 1 East P. C. 236 (Eng.).
[70] Foster 261 (Eng.).
[71] 119 Mass. 350.

side, are said to be exercises of this description. Fost. C. L. 259, 260; Com. Dig. Plead. 3 m. 18. But, prize fighting, boxing-matches, and encounters of that kind, serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or mutual ill-will."

In Regina v. Bradshaw,[72] Bradshaw was indicted for manslaughter of D. D was killed in a game of football. During the game D was "dribbling" the ball along the ground when he was met by the prisoner, who was playing on the opposite side. The prisoner was running toward D to get the ball from him, or to prevent its further progress. Both players were running at considerable speed. On approaching each other the deceased kicked the ball beyond the prisoner and the prisoner, by way of "charging" the deceased, jumped in the air and struck him with his knee in the stomach, rupturing his intestines. Bramwell, J., charging the jury, said: "There is no doubt that the prisoner's act caused the death, and the question is whether that act was unlawful. No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another. For instance, no persons can, by agreement, go out to fight with deadly weapons, doing by agreement what the law says shall not be done, and thus shelter themselves from the consequences of their acts. Therefore, in one way you need not concern yourselves

[72] 14 Cox C. C. 83 (Eng.).

with the rules of football. But, on the other hand, if a man is playing according to the rules and practice of the game, and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But, independent of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that in charging as he did he might produce serious injury, and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful. In either case he would be guilty of a criminal act, and you must find him guilty; if you are of a contrary opinion, you will acquit him."[73]

127. **Nature of the unlawfulness of the act.**—To make one guilty of manslaughter where death occurs accidentally in the doing of an unlawful act, the act must be unlawful in the sense that it is bad in itself and done with an evil intent. A killing in the doing of an act that is wrong only because forbidden by some statute, is not manslaughter. In State v. Horton,[74] the defendant accidentally, and without negligence, killed his companion while hunting on another's land without permission of the owner, thus violating the express provisions of a statute. He was indicted for manslaughter. The court held that as the act of hunting on another's land was not an act wrong in itself, but wrong only because made

[73] See also Regina v. Knock, 14 Cox C. C. 1 (Eng.), LEADING ILLUSTRATIVE CASES.

[74] 51 S. E. 945 (N. C.).

so by statute, the defendant could not be convicted of manslaughter.

128. **Killing in the prosecution of a lawful act.** —If death results from negligence in doing a lawful act, such death is manslaughter. Such was Chichester's case.[75] In this case, Chichester was playing with his servant. Chichester passed at him with his sword in the scabbard and the servant parried the blows with a staff. During the play the chape of Chichester's scabbard flew off and the servant was killed by the point of the sword. It was held that as there was a want of ordinary care in using a dangerous weapon in such play, where it was probable that the chape might be knocked off and the servant exposed to great bodily harm, this killing was manslaughter.

But if the act in which the killing is done is lawful, and there is no negligence, the killing is *per infortunium* (accidental), and not criminal.[76] In Regina v. Bruce,[77] the prisoner was indicted for manslaughter. It appeared that the prisoner, who was drunk, went into a shop and, in play, pulled a boy by the hair off a cask, put his arms about him and spun him around; they came thus together out of the door, the prisoner still spinning him around. The boy broke away and this threw the prisoner against a woman who was passing, knocking her down and causing her death. Erle, J., said to the jury: "I think, upon this evidence, you must acquit the prisoner. Where the death of one person is

[75] Keilw. 108 (Eng.).

[76] See also State v. Hardie, 47 Iowa 647, LEADING ILLUSTRATIVE CASES.

[77] 2 Cox C. C. 262.

caused by the act of another, while the latter is in pursuit of any unlawful object, the person so killing is guilty of manslaughter, although he had no intention whatsoever of injuring him who was the victim of his conduct. Here, however, there was nothing unlawful in what the prisoner did to this lad, and which led to the death of the woman. Had this treatment of the boy been against the will of the latter, the prisoner would have been committing an assault—an unlawful act—which would have rendered him amenable to the law for any consequences resulting from it; but as everything that was done was with the witness's consent, there was no assault, and consequently no illegality. It is, in the eye of the law, an accident, and nothing more."

129. **Killing through neglect of moral duty.**—If death is caused by negligence in omitting to do an act which it is one's moral, but not legal, duty to do, such killing does not amount to manslaughter. It is a moral duty to save life; but one who merely neglects to save another's life which he sees in peril, even though he could save it without inconvenience to himself, is not guilty of this or any other degree of homicide. Thus in Regina v. Shepherd,[78] the prisoner's unmarried daughter, aged eighteen, had for some time previous gone out to service, and occasionally returned to live with her mother and stepfather, at such times working at glove-making in order to earn her keep; she was confined with child at her stepfather's house, and the prisoner, her mother, neglected to procure a midwife or other

[78] 9 Cox C. C. 123 (Eng.).

proper person to attend her daughter when she was taken in labor, and by reason of such omission she died in childbirth. It was held that as there was no legal duty on the prisoner to procure assistance under the circumstances, she was not guilty of manslaughter.

130. **Killing through neglect of legal duty.**—On the other hand where a husband caused the death of his wife by neglecting to provide shelter for her, Gurney, B., on an indictment of the husband for manslaughter, told the jury that if they were of opinion that her death was caused or accelerated by his conduct, they should convict him.[79] The same principle has been applied to the case of negligence of the master of a boat in leaving it in charge of an incompetent person;[80] of a switchman in neglecting to turn a switch;[81] of a person in neglecting to provide food for another he had undertaken by contract to provide for;[82] and to many others. If the omission is not merely negligent, but with the object of causing death, the death will be murder and not manslaughter.

[79] Regina v. Plummer, 1 C. & K. 600 (Eng.).
[80] Regina v. Lowe, 4 Cox C. C. 449 (Eng.).
[81] State v. O'Brien, 32 N. J. L. 169, LEADING ILLUSTRATIVE CASES.
[82] Regina v. Marriott, 8 Car. & P. 425 (Eng.).

CHAPTER XIX.

LARCENY.

131. **Definition.**—Larceny, or stealing, is the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use and make them his own property, without the consent of the owner.

132. **The taking of the goods.**—In order to constitute a "taking" of the goods, the thief must have obtained control of them; they must have been, at least for an instant, under his complete control; if not, the offence is not complete. Thus if A have a purse tied to some keys in his pocket, and B, intending to steal the purse, take the purse out of A's pocket but the keys stick in the pocket, and A arrests B with the purse in his hand, it is not larceny, for B never had complete dominion over the purse. In Edmonds v. State,[83] the defendant was indicted for larceny of a hog. It appeared that the defendant enticed the hog about twenty yards by dropping corn in front of it; he then struck the hog with an axe, but was frightened away. The court held that the larceny was not complete, saying: "The controlling principle in such cases would seem to be that the possession of the owner must be so far changed as

[83] 70 Ala. 8.

that the dominion of the trespasser shall be complete. His proximity to the intended booty must be such as to enable him to assert his dominion, by taking actual control or custody."[84]

So where A, intending to steal B's money, knocked it out of B's hand, and was then frightened away, it was held not to be larceny, the court saying: "Though the owner's possession is disturbed, yet the offense is not complete if the accused fail to acquire such dominion over the property as to enable him to take actual custody or control."[85] If, however, the taker have dominion over the goods, the caption is sufficient, no matter for how short a period of time the control continues; thus in Lundy v. State,[86] where defendant killed a cow by shooting it, and had partially skinned the carcass when he was frightened away, it was held that the dominion thus exercised was a sufficient "taking" to constitute larceny, if the other elements of the crime of larceny were present.

133. **The carrying away of the goods.**—The property must not only be taken, it must be carried away. The moving of the property any distance, however small, is sufficient to satisfy this element of the crime. In the case last cited, the only moving of the cow was that done in turning over the carcass in skinning it. This was held a sufficient carrying away. So where A put his hand in the pocket of B, and lifted a book an inch above the pocket, the

[84] See also State v. Alexander, 74 N. C. 232, LEADING ILLUSTRATIVE CASES.

[85] Thompson v. State, 94 Ala. 535.

[86] 60 Ga. 143.

larceny was held to be complete.[87] But there must be some moving of the property. Therefore, where A, intending to steal the horse of B, put his hand on the halter for the purpose of leading the horse away but was stopped before he could do so, it was held that the larceny was not complete.[88]

134. **Use of an innocent agent.**—The taking and carrying away need not be by the hand of the thief. As we have seen, what one does through another he does himself. If A employ a child, too young to be responsible, to take goods for him, A is himself guilty of larceny. So if A employ the wife of B to steal B's goods, A is guilty of larceny, at common law, for by the common law rule a wife cannot be guilty of stealing her husband's goods. It has also been held that if A point out goods of B to C, and sell them to C as his own, C believing them to be A's goods, if C take the goods and carry them away, A is guilty of larceny.[89] As said by White, P. J., in Doss v. State,[90] "The defendant did not take the animal himself; but by selling it to Hardy, upon the pretense that it was his, he did procure Hardy, who was entirely innocent, and who believed defendant was the owner, to buy and take possession of the animal. This was certainly causing another to be deprived of his property by indirect means, and under circumstances which, in contemplation of the statute, would make him a principal in the theft."

[87] Rex v. Thompson, 1 M. C. C. 80 (Eng.).
[88] See Regina v. Wallis, 3 Cox C. C. 67 (Eng.).
[89] Cummings v. Commonwealth, 5 Ky. L. R. 200.
[90] 21 Tex. App. 505.

In Commonwealth v. Barry,[91] the defendant was indicted for larceny of a trunk and its contents. The evidence showed that the defendant, having checked a valise at a railway station, fraudulently took the check from the valise and attached it to a trunk belonging to another person. This trunk was carried by the railway company to the destination to which it was checked. The defendant contended that as the only act he had done was to attach the check to the trunk, there was no caption or asportation by him, and therefore he could not be convicted of larceny. The court said: "The real question was whether the defendant then, feloniously, and with intent to steal, set in motion an innocent agent [the railway agents] by which the trunk and its contents were to be removed from the possession of the true owner, and put into the defendant's possession, and by means of such agency effected the purpose. * * * If, before the trunk had been started, the scheme had been detected, the offense of the defendant would have been an attempt to commit larceny, and doing an act toward the commission of it, but failing in the perpetration; but as soon as the asportation was complete, for however short a distance, the offense of larceny was committed, such asportation having been caused by him, by fraudulent means, and through an innocent agent, unconscious of what, in fact, he was doing. As soon as the trunk was placed on board the cars, checked, with the corresponding check in the possession of the defendant, or his confederate, the trunk and its contents were

[91] 125 Mass. 390.

in the possession and control of the defendant or his confederate, and it is immaterial which." As one may utilize the hand of another to commit larceny so he may utilize natural force such as the attraction of gravitation, or atmospheric pressure. If A bore a hole in a barn floor on which grain is stored and thus cause the grain to run out into a receptacle, this is as much a taking by A as though he took it with his own hand.

135. **The trespass.**—Not only must there be a taking of the goods, but the taking must be such as to constitute a trespass, to make it larceny. If one is lawfully in possession of goods, a subsequent disposal of them, though such disposal be in breach of the terms of the contract under which they are held, and done in fraud of the owner, and for the dishonest enrichment of the person having possession, is no larceny at common law because there was no trespass in the original taking of possession. Therefore, whenever goods come lawfully into the possession of a person, whether such lawful possession was delivered by the owner, or obtained in any other way, no subsequent dealing with the goods by the person in possession amounts to larceny. Thus where A gave B permission to ride his (A's) horse to a certain place and then turn it loose, and on the way B exchanged the horse for an overcoat, it was held to be no larceny of the horse. There was no larceny when B took possession of the horse, for such taking of possession was with the consent of the owner; the exchanging of the horse was not larceny, for when the exchange was made, B was in

lawful possession of the horse, hence there was no trespass.[92] In Rex v. Leigh,[93] the same principle was followed. In that case, A's house being on fire, B, a neighbor, assisted in carrying out some of the goods in order to save them. Later when asked by A to return the goods, B denied having them. On an indictment for larceny it was held that B could not be convicted, as, the goods being taken out of the house by B with the consent of the owner, B was in lawful possession, and no subsequent conversion would be larceny.

136. **When owner had no possession.**—If the owner never had possession of the goods alleged to have been stolen, there can be no trespass as against him, and hence no larceny. Hence if the goods are converted before they reach the owner such conversion is not larceny.

In Regina v. Bird,[94] Bird was indicted for larceny of 19 shillings from M. It appeared from the evidence that Bird was attending a merry-go-round when M got in to take a ride, handing Bird a sovereign in payment and asking for the change. Bird handed M 11 pence and said she would give her the balance when the ride was finished, as the merry-go-round was then about to start. When the ride was over M again asked for the change, but Bird refused to give her any more. The majority of the court held that Bird could not be convicted of larceny of the balance of the change, 19 shillings, as these 19 shillings had never been in the possession

[92] Stokeley v. State, 24 Tex. App. 509, 6 S. W. 538.
[93] 1 Leach C. C. 52 (Eng.).
[94] 12 Cox C. C. 257 (Eng.).

of M and hence were not taken from M by any act of trespass.

The same principle has often been applied in cases where a person has been given a bill to get changed. If such person—not being a servant—convert the money originally handed to him, this is not larceny, for he was lawfully in possession of such money, and there is no trespass; if he get the original money changed, and convert the change, he is not guilty of larceny of the change from the owner of the original bill, for the change was never in the possession of such owner; nor is he guilty of larceny of the change from the person furnishing the change, for such person has delivered up all possession of such change.

In Rex v. Hawkins,[95] A owed B a sum of money and paid it to C, a servant of B, who was not authorized by B to receive money for him, though A supposed he was. C converted the money to his own use and never paid it over to B. It was held that C was not guilty of larceny. The money had never come into his master's possession, therefore there was no trespass as to him; and as A had voluntarily given C possession, there was no trespass as to him.

137. **Larceny by a servant.**—It was thought by some of the early common law judges that a servant who was entrusted by his master with the master's goods was in possession of such goods, and that therefore if he converted them to his own use, by using, selling, or otherwise disposing of them in

[95] 7 C. & P. 281 (Eng.). See also Rex v. Bull, 2 Leach C. C. 841 (Eng.), LEADING ILLUSTRATIVE CASES. Compare Regina v. Read, 6 Cox C. C. 134 (Eng.), LEADING ILLUSTRATIVE CASES.

fraud of the owner's interests, he was not guilty of larceny, and it was so held in some cases. But later the doctrine obtained that a mere servant did not have true possession of his master's goods, but only custody of them, and that the legal possession remained in the master. Therefore if the servant converted goods delivered to him by the master, such conversion was larceny.[96]

138. **Custody distinguished from possession.**—At first this distinction between custody and possession was confined to the case of mere servants, or persons who were entrusted with goods to be handled in the presence of the owner. Later the doctrine arose that persons who were entrusted with goods to be handled out of the presence of the owner might have only custody as distinguished from possession. In Holbrook v. State,[97] the defendant was not the servant of the prosecutor. He drove the prosecutor to the train. On arriving at the station the prosecutor left a quilt with the defendant, asking him to leave it at the house of the former. The defendant sold the quilt. On an indictment for larceny of the quilt, it was held that the defendant had mere custody of the quilt, not possession, and his act of selling made him guilty of larceny.

The same principle has been applied to other cases where the property was delivered to the defendant for a specific purpose only.

139. **When intent exists at time possession is acquired.**—When it is said that there can be no larceny

[96] Crocheron v. State, 86 Ala. 64, 5 So. 649.
[97] 107 Ala. 154, 18 So. 109.

of goods already in possession of the defendant because there can be no trespass, it is assumed that the defendant came into possession lawfully. If he acquires possession unlawfully the rule is different. If the defendant has, at the time the possession is delivered to him, the intent to convert the goods to his own use and deprive the owner permanently of his property in them, he does not obtain possession lawfully and, if he subsequently converts the goods to his own use, he is guilty of larceny. If A, intending to steal a horse from B, obtains the horse from B under a contract of hire, and, while in possession, sells the horse, he is guilty of larceny, while if he had no such intent at the time of the hiring, but such intent had come to him afterward, he would not, as we have seen, be guilty of this crime, for his possession would have been lawful.

140. **Continuing trespass.**—If the possession is obtained by one by a trespass, though without intent to steal at the time of getting possession, if later while the goods are in his possession the intent to steal comes to him, and in pursuance of that intent he converts the goods, he commits larceny. His possession being unlawful from the first, the trespass by which he acquired possession continues while the goods are in his possession; and when the conversion takes place the trespass and intent concur and the larceny is complete. In Commonwealth v. White,[98] White went to A's stable in A's absence and took A's horse, intending to use it to go on an errand and to return it. While still on the road he decided

[98] 65 Mass. 483, LEADING ILLUSTRATIVE CASES.

to go to another place, which he did, and while there sold the horse. It was held that he was properly convicted of larceny of the horse, though at the time he took possession of it he had no intent to steal it.

The court said: "If a person by committing a trespass (the taking the horse from the stable without permission) has tortiously and unlawfully acquired possession of personal property belonging to another, and afterwards conceives the purpose of fraudulently depriving the owner of it, and in pursuance of that design, with a felonious intent, carries it away and converts it to his own use, he thereby commits and is guilty of larceny."

It is on this principle of a continuing trespass that it is held in some jurisdictions that if A steal goods in one state, and bring them into another state, he can be convicted of larceny of the goods in the latter state although the original taking did not take place in the latter state. It is said that when the goods are taken in the first state they not only remain the property of the owner but the possession in legal contemplation remains in him, and every moment's continuance of the trespass of the taker is as much a trespass and a wrong as the original taking, consequently every step he moves with the goods is a new taking and therefore a larceny.[99] This rule has been applied to a taking in a foreign country.

141. **Larceny by bailee.**—It was early determined by the courts that a bailee had lawful possession of the goods bailed to him, and that therefore no subsequent conversion of the goods by him

[99] State v. Bennett, 14 Iowa 479. Contra, Lee v. State, 64 Ga. 203.

to his own use could be larceny.[1] If A hired a horse to B to drive, or gave B goods to deliver for him, or lent B a lawn mower: in all these cases B had possession, not merely custody, of the goods, and was not guilty of larceny in converting them. Two limitations, however, were engrafted on this doctrine. One was that if the bailee, at the time the goods were delivered to him, obtained them with the intent to steal them, such obtaining was a taking by trespass; he was not therefore in lawful possession, hence a subsequent conversion was larceny.

Thus in Macino v. People,[2] A induced B to entrust him with money to deliver to B's relatives in Italy, by representing himself to be a priest about to return to that country. A intended to steal the money at the time it was delivered to him. The supreme court held this to be larceny in A.

In Rex v. Pear,[3] Pear was indicted for stealing a horse from B. He hired the horse from B, in London, to travel to S, saying he would return by night. He sold the horse the next day. The court told the jury that if the prisoner hired the horse to take the journey mentioned and afterwards changed his mind and sold it, he was not guilty of larceny; but if the journey was a mere pretense to get possession, and he had hired it to steal it, they should convict. The jury convicted and on appeal it was held that the charge of the court was correct.

Termination of the bailment. Since it is the fact

[1] Regina v. Thomas, 9 C. & P. 741 (Eng.), LEADING ILLUSTRATIVE CASES.

[2] 12 Hun 127 (N. Y.). See also Rex v. Patch, 1 Leach C. C. (4th ed.) 238 (Eng.), LEADING ILLUSTRATIVE CASES.

[3] 2 East P. C. 685 (Eng.).

that the bailee has lawful possession of the goods bailed to him that prevents a subsequent conversion of them from being larceny, it follows that if, after the bailment is terminated, the bailee converts the goods, he is guilty of larceny, for after the bailment is ended the bailee is no longer in lawful possession, the legal possession is then considered as being again in the owner though the physical possession may be in the bailee. Thus in Rex v. Charlewood,[4] C hired a horse at X to go from X to Y. He performed the journey and returned with the horse to X, and then converted it. The court instructed the jury that if the prisoner performed the journey for which he hired the horse, and returned to X, where instead of delivering it to the owner, he afterwards converted it to his own use, that would be larceny, for the end and purpose of the hiring would be over.

142. **Breaking bulk.**—The same principle applies if the bailee breaks bulk without authority from the owner and afterwards converts the goods or any part of them. By breaking bulk he acts unlawfully and thus terminates the bailment and is no longer in legal possession. Thus if A delivers a bale of goods to a carrier, to carry, and the carrier breaks open the package and later converts the goods, he is guilty of larceny, for his possession was terminated by the unlawful breaking. If, however, he had converted the whole bale before terminating the bailment, there would have been no larceny. This doctrine has been applied not only to cases of actual breaking but to a separation of articles bailed as a

[4] 1 Leach C. C. 409 (Eng.).

unit. In Commonwealth v. James,[5] the prosecutor sent a quantity of barilla to B to grind. B ground it and then abstracted part of it, supplying in place of the part abstracted a quantity of plaster of Paris mixed with the remainder of the barilla. On an indictment for larceny of the part abstracted the court said: "The defendant did not pursue the purpose for which it was delivered to him, but separated a part from the rest, for his own use, without pretense of title; and by that act the contract was determined. From thenceforward the legal possession was in the owner, and a taking of the part so fraudulently separated from the rest, *animo furandi* (with intent to steal), must be considered as larceny."

143. **When owner parts with title.**—We have seen that if possession of goods is obtained from the owner by a trick with the intention to convert the goods, larceny is committed. This is true only when in delivering possession the owner intends to part with custody or possession merely. If when he delivers the goods the owner intends to part with the title as well as the possession, no subsequent conversion will be larceny, even though the delivery was induced by fraud. In the view of the law, the taker having acquired title to the goods, there can be no trespass by him in any subsequent dealing with them.[6] In the last case cited the prisoner went to the prosecutor and said falsely that she had been sent by a neighbor to borrow a guinea for the neigh-

[5] 1 Pick. 375 (Mass.).

[6] Rex v. Coleman, 2 East, Pleas of the Crown, p. 672 (Eng.); Rex v. Moore, Leach C. C. (4th ed.) 314 (Eng.), LEADING ILLUSTRATIVE CASES.

bor. The prosecutor handed her the guinea and she made away with it. It was held, since the prosecutor never expected to receive the same guinea back, but only its equivalent, and had parted with the title to the money and not merely the possession, this was not larceny, but the crime of obtaining by false pretense. On the other hand, in a case where A had deposited grain in the warehouse of B, and the prisoner obtained the grain from the servant in charge of the warehouse by falsely stating that he had been sent for it by another servant in charge of another warehouse, to take to the railway, it was held that he was guilty of larceny of the grain, for the grain was delivered to him only for a special purpose and no title was intended to pass.[7]

144. **Larceny of lost property.**—Ordinarily a person finding lost property is entitled to take possession of it, and in so doing does not commit a trespass. He is entitled to both possession and title to it against all the world but the true owner. The true owner still has title to such property but the finder has possession. Being in lawful possession, if he subsequently converts the property to his own use he is not guilty of larceny. If when the property is found and finally taken possession of there are no marks about it or circumstances in connection with the finding to indicate to whom it belongs, a conversion of it to the finder's own use is not larceny, even though at the time it is converted the finder knows the true owner.[8]

[7] Regina v. Robins, Dears. C. C. 418 (Eng.).

[8] Regina v. Thurborn, 1 Den. C. C. 387 (Eng.), LEADING ILLUSTRATIVE CASES.

145. **Same subject—Identifying marks.**—But if there were such marks or circumstances as would indicate the owner, or would even lead the finder to believe that the true owner could be found, and he took possession with intent at the time of not delivering to the owner but converting to his own use, such taking is larceny.[9] But even where there are such circumstances there is no larceny unless, at the time the finder took possession, he did so with the intent to convert. If he took possession intending to return the goods to the owner, but subsequently decided to convert them, it is not larceny.

In Merry v. Green,[10] A bought a secretary at an auction sale. He took it home, and while repairing it discovered a secret drawer in which he found a sum of money. This money he converted to his own use. He testified that when it was offered for sale the auctioneer said that he sold not only the secretary but all that it contained. The auctioneer testified that he said he sold the secretary but not its contents. Parke, B., said: "If we assume * * * that the plaintiff had express notice that he was not to have any title to the contents, if there happened to be anything in it, and indeed without such express notice, if he had no ground to believe that he had bought the contents, we are all of opinion that there was evidence to make out a case of larceny. It was contended that there was a delivery of the secretary and the money in it to the plaintiff as his property

[9] Regina v. Thurborn, 1 Den. C. C. 387 (Eng.), LEADING ILLUSTRATIVE CASES; State v. Ransom, 22 Conn. 153.

[10] 7 Mee. & Wels. 623 (Eng.).

which gave him a lawful possession, and that his subsequent appropriation did not constitute a felony. But it seems to us that though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it, both were ignorant of its existence, and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was simply a case of finding. * * * If the finder knows who the owner of the lost chattel is, or if from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion *animo furandi* (with intent to steal) constitutes a larceny."

In Regina v. Thurborn, cited above, the defendant found a banknote on the highway. He took possession of it intending, at the time, to keep it for his own use. There was nothing about the note nor anything in the circumstances of the finding to indicate who the owner was. Later, and while the note was still in his possession, the defendant was informed that A was the owner, and that he had dropped it accidentally; he then changed it, and appropriated the money. It was held that he was not guilty of larceny.

146. **Larceny of mislaid property.**—What has been said above applies to goods that have been lost, not to goods merely mislaid. Mislaid goods are regarded as still in possession of the owner, and therefore a taking of them with intent to convert, is lar-

ceny. Thus where a passenger left his suit case in a railway train, where it was found by an employee of the company and converted, such conversion was held to be larceny.[11] So where a customer left a whip in a store and the defendant appropriated it.[12]

147. **Larceny of goods delivered by mistake.**— Where one is indicted for larceny in converting goods delivered to him by mistake, whether he can be convicted or not depends on his intention and knowledge at the time he took possession. If at the time he received the goods he knew of the mistake and yet intended to convert the goods to his own use, he is guilty of larceny. But if he received the goods innocently, not knowing of the mistake, a subsequent conversion will not render him guilty of this crime.[13] In the case last cited, a postman delivered a letter containing a check to the prisoner by mistake, the prisoner's name being the same as that of the person for whom the check was really intended. There was no evidence that the prisoner, when he received the check, knew that it was for another, though he did know it when he cashed the check. On this ground it was held that the prisoner could not be convicted of larceny.

Where the mistake occurs not in delivering the property to the wrong person, but in paying or lending to the person intended, more money than was intended to be delivered, the courts are not in accord whether, if the person to whom the money is handed

[11] Regina v. Pierce, 6 Cox C. C. 117 (Eng.).
[12] People v. McGarren, 17 Wend. 460 (N. Y.).
[13] Rex v. Mucklow, 1 Moo. C. C. 160 (Eng.).

later discovers the mistake and then keeps the whole, he is guilty of larceny. Those courts that hold no larceny is committed, take the view that defendant obtains possession as soon as the money is handed to him. As he then has lawful possession, no subsequent conversion can make him guilty of larceny.[14] Those that take the other view hold that the prisoner does not really get possession until he examines the property handed to him, and if, when he examines it and discovers the mistake, he then intends to convert it, the taking and the intent concur and larceny is committed.[15]

[14] Regina v. Flowers, 16 Cox C. C. 33 (Eng.).
[15] See Regina v. Ashwell, 16 Cox C. C. 1 (Eng.).

CHAPTER XX.

LARCENY—CONTINUED.

148. **Real estate as subject of larceny.**—In the definition of larceny the property which is the subject of the offense is described as "personal goods." No other kind of goods was the subject of this crime at common law, though statutes now exist in some jurisdictions enlarging the scope of the crime to cover the taking of other kinds of property. Land was not the subject of larceny at common law. The term "land" included not only the land itself, but all things growing on the land while still attached thereto. Thus growing trees, grass and crops were not the subject of larceny if they were still attached to the soil.

As trees were regarded as land, while growing, so was the fruit on trees. Therefore it was not larceny either to cut down and carry away a tree or to pluck and carry away the fruit of a tree. Houses built on the land partook of the nature of the land, and so did anything attached to the house. Therefore it was not larceny at common law to break off and take lead from a roof. It was even held not larceny to take title deeds to land, on the ground that they partook of the nature of the land.[16] Minerals, before separation from the soil, were not the subject of

[16] Rex v. Woody, Y. B., 10 Ed. 4, Pl. 9 (Eng.).

larceny;[17] and manure when spread on the land was considered part of the land.

149. **Same subject—When severed.**—Trees, grass, fruits, etc., cease to be real estate after they have been severed, and they are then the subject of larceny like any other personal property. But to make the taking of such products of the soil larceny, an interval must elapse between the severing and the taking and carrying away, and during this interval the property must have been in the possession of the owner of the soil as personal property. As said by Hale,[18] "If a man come to steal trees, or the lead off a church or house, and sever it, and after about an hour's time, or so, come and fetch it away, it is felony, because the act is not continuated, but interpolated, and in that interval the property lodgeth in the right owner as a chattel, and so it was agreed by the court of king's bench, 9 Car. 1, upon an indictment for stealing the lead off Westminster Abbey."

150. **Animals as subject of larceny.**—At the common law no animal was the subject of larceny unless it was either fit for food or for producing food. "Under decisions of English and American courts, made upon the common law definition of larceny, Mr. Bishop classes the following animals, when reclaimed, as the subjects of the offense: Pigeons, doves, hares, conies, deer, swans, wild boars, cranes, pheasants, partridges, and fish suitable for food, including oysters. To which might be added wild turkeys, geese, ducks, etc., when reclaimed. Of those

[17] People v. Williams, 35 Cal. 671.
[18] 1 Hale, Pleas of the Crown, p. 510 (Eng.).

animals of which there can be no larceny, though reclaimed, he puts down the following: Dogs, cats, bears, foxes, apes, monkeys, polecats, ferrets, squirrels, parrots, singing birds, martins and coons. In the South, squirrels are in common use as food animals, and the hunters of all climates regard bears as good food. Iowa is credited with the decision, Warren v. State, 1 Greene 106, that coons are unfit for food, and therefore, by the common law, not the subject of larceny, when reclaimed. Among the colored people of the South the coon, when fat in the fall and winter, is regarded as a luxury, and the Iowa decision would not be regarded by them as sound law or good taste."[19] Modern decisions have extended the list of animals that may be stolen to include those which though not fit for food are valuable for some other reason; dogs have been held to be the subject of larceny in some states; as have singing birds;[20] and animals valuable for their fur.[21]

151. **Same subject—Reducing to possession.**—Since the property taken must be the property of another, and since wild animals are not owned by anyone, it is not larceny to take such animals though they are taken on the land of another. If, however, such animals are once reduced to possession by anyone, a taking from such person is larceny. Such animals are reduced to possession if they have been captured and tamed or held in custody so that they cannot come and go as they please, or if they

[19] English, C. J., in Haywood v. State, 41 Ark. 479.
[20] Haywood v. State, 41 Ark. 479.
[21] State v. House, 65 N. C. 315.

have been killed and taken possession of.[22] Where a wild animal has been killed by a trespasser on the land of another, the same rule that we have seen applied to the severing of trees by a trespasser applies. If the act of killing and taking possession is one continuous act, there is no larceny; but if between the time of killing and taking possession the possession vests in the owner of the soil, then the taking is larceny. It has been held that where the trespasser took possession immediately on killing an animal, the fact that he hid the animal for a time on the land, did not vest possession in the owner, as the trespasser did not relinquish possession but was merely using the land as his own hiding place.[23]

152. **Valueless goods as subject of larceny.**—To constitute larceny the thing stolen must have some value. It is held, however, that the least value is sufficient, even though that value may be less than that of any known coin.[24] It has been held larceny to steal even a piece of paper.[25]

153. **Choses in action as subject of larceny.**—Choses in action, such as bonds, bills and promissory notes, were not the subject of larceny at common law, being of no intrinsic value, but mere evidence of a right.[26] Neither could one be convicted, in taking such instrument, for larceny of the paper on which it was written, for the paper was considered merged in the writing and to have lost its value as paper.

[22] Regina v. Townley, 12 Cox C. C. 59 (Eng.).
[23] Regina v. Townley, 12 Cox C. C. 59 (Eng.).
[24] Regina v. Morris, 9 Car. & P. 349 (Eng.).
[25] Regina v. Clark, Russ. & R. 181 (Eng.).
[26] Blackstone, Commentaries, p. 234.

If, however, the instrument was void for any reason, it remained a piece of paper, and as such was the subject of larceny.[27] Statutes both in England and most of the United States have changed this rule of the common law, and make instruments of all kinds the subject of larceny.

154. **Ownership of the property.**—Generally speaking, property may be stolen not only from the true owner but from any one in possession of it at the time it is taken. Thus one may be convicted of larceny from one who had himself stolen the property from another;[28] or from a bailee to whom the owner had entrusted possession of it.[29] It is larceny for the true owner to steal his own property which he has bailed to another, if he takes it with the intent of charging the bailee with the loss; or if he takes it from a person to whom he has pledged it, with intent to deprive such pledgee of his security.

In Henry v. State,[30] Henry was indicted for larceny of a bicycle. Henry had pledged a bicycle to the prosecutrix as security for board. The prosecutrix allowed him to ride the bicycle occasionally. After Henry had been in the house for a week the prosecutrix demanded the amount of the board, but Henry left the house without paying it. Several days later he returned and carried away the bicycle. The court said: "When property has been delivered by the owner to one as a pledge to secure a debt, the pledgee has sufficient interest in the same to maintain

[27] Regina v. Perry, 1 Car. & K. 725 (Eng.).
[28] Ward v. People, 6 Hill 144 (N. Y.).
[29] Henry v. State, 110 Ga. 750.
[30] 110 Ga. 750.

a prosecution against any one, even the true owner, by charging that the property belonged to him, the pledgee. The fact that the pledgor was permitted to use it does not deprive the pledgee in this case of the right to its custody and control. Nothing can be gathered from the evidence in the record to indicate that she ever consented to such a use or disposition of the same as to absolutely deprive her of such possession."

155. **Same subject—Joint ownership.**—It is said that one partner or joint tenant or tenant in common cannot be guilty of larceny in taking the property from his co-partner in the property. In larceny there must be a trespass; and as each joint owner is entitled by law to the equal possession of the property owned in common, he commits no trespass in taking possession. If, however, one part-owner is in charge of the property and liable for its safe-keeping and another part-owner takes it from him with intent to convert it to his own use, it is larceny.[31]

Husband and wife. At common law all the personal property of the wife is vested in the husband on their marriage, therefore the husband could not commit larceny as against his wife. Neither could the wife commit larceny of the property of the husband, owing to the fiction that husband and wife were one person. Statutes very generally exist now vesting in the wife a separate ownership of her goods. Under these statutes it has been held that the husband can be guilty of larceny of his wife's goods.[32]

[31] Regina v. Webster, 9 Cox C. C. 13 (Eng.).
[32] Beasley v. State, 138 Ind. 552; Hunt v. State, 79 S. W. 769 (Ark.).

CHAPTER XXI.

LARCENY—CONTINUED.

156. **Intent—Evil mind.**—The intent required by the definition of larceny is "a felonious intent." The defendant must have had the "evil mind" of the criminal law. He must have taken the property intentionally, and without right and without color of right or excuse. If the accused took the property thinking it was his own he did not commit larceny, and it is immaterial whether his mistake arose from ignorance or mistake of fact or of law. As said by Beasley, C. J., in Cutter v. State:[33] "The criminal intent, which is an essential part of that crime, involves a knowledge that the property taken belongs to another; but even when all the facts are known to the accused, and so the right to the property is a mere question of law, still he will make good his defense if he can show, in a satisfactory manner, that being under a misapprehension as to his legal rights, he honestly believed the articles in question to be his own." Thus where a hotel keeper, thinking, erroneously, that he had a lien on a guest's baggage for unpaid board, took the trunks of the guest, it was held that he could not be convicted of larceny.[34] So where accused took unmarked hogs running at large belonging to another, the court was held to

[33] 36 N. J. L. 125.

[34] People v. Husband, 36 Mich. 306.

have properly instructed the jury in telling them that if they believed that the defendant took the hogs charged in the indictment, yet that he so took them with an honest belief, although he may have been mistaken in such belief, that he had the right or the authority to do so, or if the evidence on this point was such as to raise in their minds a reasonable doubt as to whether the defendant did believe he had the right to take such hogs, then in such case they must give him the benefit of such doubt and acquit him.

157. **Same subject—To convert.**—The intent must also be to convert the property to the taker's use, or to deprive the owner of it permanently. Therefore it is not larceny to take a stick from a person who is about to use it to beat the taker, if there is no intention of keeping it permanently; nor is it larceny to take a horse to ride, or to aid in an escape, if there is the intention to return the horse or to place it where it will return to the owner.[35]

In Rex v. Phillips,[36] Phillips was indicted for stealing a mare from one Goulter. The prisoner had taken the mare from Goulter's stable and had ridden her to L, thirty miles away. There he left the mare in care of an ostler at an inn, directing him to feed her, and saying he would return in three hours. Later the same day the prisoner was arrested fourteen miles from L, walking away from L. The jury found that the prisoner meant merely to ride the mare to L and to leave her there, and that he had had no intention to return for her, or to make further

[35] Phillips' Case, 2 East P. C. 662 (Eng.).
[36] 2 East P. C. 662 (Eng.).

use of her. On this finding of fact the court held that the prisoner could not be convicted of larceny of the mare, as there was no intention in the prisoner to change the property in the mare, or to make her his own, but only to use her for a special purpose, viz.: to save labor in traveling. But the judges agreed that if the prisoner had abandoned the mare in such a way that she would likely never have been discovered by the owner, he might have been convicted of larceny.

If a man take a harrow or plow, and after plowing his land return it to the place whence he took it, this is not larceny.[37] But it has been held that, if the property is taken and disposed of in such a way, or abandoned in a place where it is not likely that the owner will ever recover it, the jury is justified in finding that the taker intended to deprive the owner permanently of the property.[38] Thus in the case last cited, a servant was convicted of larceny of his master's plate on proof that he had taken it and pawned it in his own name, though the jury found that he ultimately intended to return the property. Crowder, J., in affirming the conviction said: "Probably it very often happens that when stolen goods are pawned, there is an intention to get them back again if the person pawning them should ever be able to do so, and in that case to return them, but such an intention affords no ground for setting aside a verdict of guilty, when the offense of larceny is satisfactorily proved by the evidence."

[37] 2 East P. C. 661, § 98 (Eng.).
[38] Regina v. Trebilcock, 7 Cox C. C. 408 (Eng.).

158. **Same subject—To compel reward.**—If property be taken with the intent never to return it unless the owner pays the taker a reward, such taking is larceny. In Commonwealth v. Mason,[39] the court said: "We think that when a person takes property of another, with intent to deprive the owner of a portion of the property taken, or of its value, such intent is felonious and the taking is larceny. * * * The jury must have found, under the instructions given them, that the defendant took the horse with intent to conceal and retain it until he could obtain a reward from the owner, or until he could effect a purchase from him at a price less than its real value. The intent, in either contingency, was to deprive the owner of, and appropriate to his own use, a portion of the value of the property. We are of the opinion that, upon principle and the weight of the authorities, the taking with such intent was larceny." A mere withholding of property from the owner, however, in the hope of obtaining a reward for its return, does not constitute larceny.[40]

159. **Same subject—To resell to owner.**—As a taking with the intent of compelling the owner to pay a reward before receiving back his property is larceny, all the more is it larceny to take property with the intent of compelling the owner to pay its full value; as, a taking with intent to sell it back to the owner. Thus, in Regina v. Hall,[41] A,

[39] 105 Mass. 163.
[40] State v. Arkle, 116 N. C. 1017; Micheaux v. State, 30 Tex. App. 660.
[41] 3 Cox C. C. 245 (Eng.), LEADING ILLUSTRATIVE CASES.

a clerk, took some tallow from his master's warehouse, and, acting in collusion with B, told his master that B had brought it for sale. This was held to be a larceny of the tallow. Parke, B., said: "In this case there is an intent to deprive the owner of the dominion over his property, for it is put into the hands of an intended vendor, who is to offer it for sale to the owner, and if the owner will not buy it, to take it away again." If, however, there is no intent to exercise dominion over the property or to withhold it from the owner, but merely to receive money from the owner by means of some false representation in regard to the property, there is no larceny. In Regina v. Holloway,[42] H was employed by A to do work on certain skins, being paid by the piece. He secretly took dressed skins, belonging to A, from A's warehouse, intending to put them with skins dressed by himself, and thus obtain credit for having himself dressed them. This was held not to be larceny, as defendant did not intend to deprive the owner of the skins.

160. **Same subject—Lucri causa.**—In some jurisdictions it is held that the taking must be *lucri causa* (for the benefit of the taker), and if this element is not present, the crime of larceny is not committed. Thus, in People v. Woodward,[43] W was indicted for larceny of a horse from A. W and A had had a quarrel, and in revenge, W took the horse from A's stable, killed it, and buried it. This was held to be no larceny, as it was not done

[42] 3 Cox C. C. 241 (Eng.).
[43] 31 Hun 57 (N. Y.).

lucri causa, but with the sole desire of injuring the owner. The more general rule is that the taking need not be *lucri causa;* that all that is necessary is an intent to deprive the owner of the property. In accordance with this view it has been held that to take and kill a horse to prevent a third person from being convicted for a previous larceny of it, was larceny.[44] So, where A took a horse belonging to B, and hid it five miles away, that B should be put to some expense and trouble in getting it back, this was held to be larceny.[45] It has even been held larceny to take property, though it was devoted to the use of the owner. Thus, in Regina v. Privett,[46] a servant was convicted of larceny of five sacks of oats. The oats were taken to give, and were in fact given, to the owner's horses. This was held to be larceny, because "the prisoner took the oats knowingly against the will of the owner, and without color of title or of authority, with intent, not to take temporary possession merely, and then abandon them, but to take entire dominion over them." This case has been doubted.

161. **Larceny from the person.**—In some jurisdictions there is, by statute, a particular crime of "larceny from the person." This crime is usually punished more severely than a simple larceny. All the elements of this crime are identical with the elements of simple larceny, except that in this crime the property must be taken from the person.

[44] Rex v. Cabbage, Russ. & R. 292 (Eng.).
[45] State v. Slingerland, 19 Nev. 135.
[46] 1 Den. C. C. 193 (Eng.).

To constitute a larceny from the person there must be a removal of the property from the person. In Rex v. Thompson,[47] the prosecutor testified as follows: "I was at a fair at East Grinstead; I felt a pressure of two persons, one on each side of me; I had secured my book in an inside front pocket of my coat; I felt a hand between my coat and waistcoat; I could feel the motion of the knuckles; I was satisfied the prisoner was attempting to get my pocket-book out. The other person had hold of my right arm, and I forced it from him, and thrust it down to my book, in doing which I just brushed the prisoner's hand and arm; the book was just lifted out of my pocket; it returned into my pocket; it was out; how far I cannot tell; I saw a slight glance of a man's hand down from my breast. I secured the prisoner after a severe struggle, and a desperate attempt at escape, in which he was assisted by twenty or thirty persons." Upon cross-examination, the witness said, "My coat was open, the pocket not above a quarter of an inch deeper than the book; I am satisfied the book was drawn from my pocket; it was an inch above the top of the pocket." Upon this evidence it was insisted for the prisoner that this did not amount to a taking from the person. It was held that the accused was not guilty of larceny from the person as "from first to last the book remained about the person of the prosecutor."

While there must be a removal of the property from the person, removal but a hair's breadth is

[47] 1 M. C. C. 80 (Eng.).

sufficient. In Rex v. Lapier,[48] the prisoner tore a lady's ear-ring from her ear, but it caught in her hair. It was held that he was rightly convicted of larceny from the person, as the forcing it from her ear was a severance from her person. It was said by Van Fleet,[49] that the object of the statutes creating this crime is "to protect persons and property against the approach of the pickpocket, the purse snatcher, the jewel abstracter, and other thieves of like character, who obtain property by similar means, and that it was in contemplation that the property shall at the time be in some way actually upon or attached to the person, or carried or held in actual physical possession." In accordance with this view of the crime it was held in the above case that the taking of a sum of money from the pocket of a pair of trousers placed under the head of a sleeping person, was not larceny from the person, but only simple larceny.[50]

162. **Larceny in a building.**—Statutes very generally exist creating the particular crime of larceny from a building, or larceny in a dwelling. To constitute this crime, it is not sufficient to show merely that the property was taken from or about a building or dwelling. It must be shown that the property taken was taken while it was under the protection of the building, and not under the immediate personal care of some one who happened to be in the house. Thus it has been held that the statute does not ex-

[48] 1 Leach C. C. 320 (Eng.).

[49] In People v. McElroy, 116 Cal. 583.

[50] Compare Regina v. Selway, 8 Cox C. C. 235 (Eng.), LEADING ILLUSTRATIVE CASES.

tend to a stealing of a watch in a store, where the watch was stolen by a customer to whom the clerk was showing it.[51]

Under some statutes it has been held that the crime must be committed in a house occupied by some one other than the prisoner; that a stealing by the accused in his own house is not within the statute.[52] The house of the husband has been held the house of the wife within this rule.[53] Since the property must be under the protection of the house, it is not larceny from the house to steal clothes hanging on the banister of the piazza;[54] or to steal property hanging at and outside of a store door on a piece of wood nailed to the door.[55] But where the accused stole five pounds of bacon hanging in a shop, near a window opened at the top, the defendant having taken it by reaching in his hand from the outside, this was held to be a larceny from a building.[56]

[51] Commonwealth v. Lester, 129 Mass. 101. Compare Simmons v. State, 73 Ga. 609.

[52] Commonwealth v. Hartnett, 3 Gray 450 (Mass.).

[53] Commonwealth v. Hartnett, 3 Gray 450 (Mass.).

[54] Henry v. State, 39 Ala. 679.

[55] Martinez v. State, 41 Tex. 126.

[56] Commonwealth v. Nott, 135 Mass. 269.

CHAPTER XXII.

EMBEZZLEMENT—LARCENY BY BAILEE—CHEATING.

163. **The statutes of embezzlement.**—We have seen[67] that it is not larceny for a person to whom money or goods have been entrusted by a third person for the owner, to convert the goods to his own use before they reach the hands of the owner. To meet this defect in the law, a statute was passed in England in 1799, creating the crime of embezzlement. This statute provides: "If any servant or clerk, or any person employed for the purpose in the capacity of servant or clerk, to any person or persons whomsoever, or to any body, corporate or politic, shall, by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for, in the name or on account of his master or masters, or employer or employers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers, for whose use or in whose name or names, or on whose account the same was or were delivered to or taken into the possession of such servant, clerk, or other person so employed, al-

[67] See § 136.

though such money, goods, bond, bill, note, banker's draft, or other valuable security was or were not otherwise received into the possession of his or their servant, clerk, or other person so employed; * * *"

This statute has been copied, in effect, though in differing language, in the states of the United States; but as the statutes in the different states differ in their language, only the principle embodied in them generally can be discussed here, the student being referred to the statute and decisions of his own state for a more detailed knowledge. The two crimes of larceny and embezzlement are distinct. Nothing that was larceny at common law is embezzlement under the statute, and nothing that is embezzlement under the statute is larceny at common law.

164. **Possession of the property.**—In general, if the property would never come into the possession of the owner save through the hands of the servant, clerk, agent, or other person mentioned in the statute, then the conversion by such servant, etc., is embezzlement. If the servant, etc., convert the property after it has come into the possession of the owner, it is larceny. The distinction is seen in the two following cases:

In Rex v. Sullens,[58] the defendant being in the employ of A, A gave him a note to get changed. Defendant got the note changed, saying to the person who gave him the change, that it was for A. He converted the change to his own use. Having been convicted of larceny of the change, the court

[58] 1 M. C. C. 129 (Eng.).

reversed the conviction, holding that as A had never had possession of the change, the defendant was guilty not of larceny, but of embezzlement.[59] In Rex v. Headge;[60] A, who suspected B, his clerk, gave a marked coin to C, a neighbor, who bought articles at A's shop with it from B. B, on receiving the coin for the article, converted it instead of putting it in the till. This was held to be embezzlement and not larceny, as A had parted with possession of the coin to C, and C to B, and B had converted it to his own use before it returned to the possession of A. If, however, B had put the coin into the till on receiving it from C, it would then have been in the possession of A, and if, afterwards, B had taken it from the till and converted it, this would have been larceny.

165. **Receipt of the property.**—The property alleged to have been embezzled must have been received for or on account of the master, under most of the statutes. If the property is received, not for the master, but for the servant himself, it is not embezzlement, even though it is earned by an unauthorized use of the master's property. If A should be employed by B to run B's automobile for hire, and should convert the money paid him by a passenger, such conversion would be embezzlement, for the money is paid him on account of his employer. But if A were employed by B as a private chauffeur, and A, without the consent of B,

[59] See also Regina v. Masters, 1 Den. C. C. 332 (Eng.), LEADING ILLUSTRATIVE CASES.

[60] Russ. & R. 160 (Eng.).

should carry a passenger, charge him for the carriage, and not turn over the money thus received to B, this would not be embezzlement, for this money is not received for or on account of B, but for A himself.

In Regina v. Cullum,[61] Cullum was indicted for embezzling £2 from A, his master. The prisoner was employed by A as captain of A's barge. As such it was his duty to take the barge with a cargo to London, and to receive back such cargo and from such person as A should direct. The prisoner had no authority to select a return cargo. He was entitled, by way of compensation, to half the earnings of the barge after deducting half the sailing expenses. The prisoner's whole time was his master's. The prisoner, by direction of A, took a load of brick to London. There he asked A if he should not take a load of manure back to Mr. Pye, of Caxton, as he must pass Caxton on his way back, but A expressly forbade his doing so. Notwithstanding this prohibition the prisoner took a load of manure back in his barge to Mr. Pye and received from him £4 as freight. When the prisoner later accounted with his master he denied that he had brought back any manure, and did not account for £2 of the money he received for carrying it. He was indicted for embezzling this £2. It was not proved that he had told Mr. Pye that he was carrying manure for his master or receiving the freight for him. It was held that the prisoner could not be convicted on these facts of embezzlement. The

[61] 12 Cox C. C. 469 (Eng.).

court said: "The statute requires, in order to constitute the crime of embezzlement by a clerk or servant, the chattel, money, or valuable security, shall be delivered to, or received, or taken into possession by him, for, or in the name or on account of, his master or employer. * * * The facts before us would seem more consistent with the notion that the prisoner was misusing his master's property, and so earning money for himself, and not for his master. Under those circumstances the money would not be received 'for' or 'in the name of' or 'on account of' his master, but for himself, in his own name, and for his own account."

In Regina v. Harris,[62] Harris was indicted for embezzlement. It appeared that Harris was a miller in the county jail, and it was his duty to grind grain sent to him, on written orders from the governor of the jail. He was to account to the governor for the money paid him for grinding. He had no right to grind any grain without a written order. He ground certain grain without a written order and pocketed the money received therefor. It was held that he was not guilty of embezzlement of this money, for, as he had no right to grind the grain, he intended in grinding it to make improper use of the machinery for his own profit, and so received the money, not for or on account of his employer, but on his own account.

166. **Persons embraced in the statutes.**—The original English statute applied to clerks and servants. Other statutes are wider in their scope and

[62] 6 Cox C. C. 363 (Eng.).

embrace not only clerks and servants, but also agents, officers of corporations, public officers, etc. Some statutes use the general term "employees." There is a general rule of law that criminal statutes are construed strictly, i. e., in favor of the accused. Therefore, in an indictment for embezzlement under a particular statute, the accused cannot be convicted unless he clearly comes within the class of persons described in the statute. Thus, under a statute using the words "clerk or servant" there can be no conviction of a person who cannot be fairly described as a "clerk" or "servant," but who is an agent.

In Rex v. Harris,[63] the prisoner, who was indicted for embezzlement under the English statute making clerks or servants liable for this offense, was employed by an overseer to collect rents and keep the books. The overseer gave no orders to the prisoner and did not interfere in the conduct of the employment. It was held that he could not be convicted as he was neither a servant nor a clerk, but an agent. So, under a statute punishing embezzlement by "agents" it was held that one who hired property for his own use could not be convicted of the crime, as he was a bailee, not an agent.[64]

167. **The property embezzled.**—We have seen that at common law only personal property could be the subject of larceny. The statutes of embezzlement were enacted to supply the defects in the law

[63] 17 Cox C. C. 656 (Eng.).
[64] Watson v. State, 70 Ala. 13.

of larceny resulting from the doctrines of possession and trespass; they were not intended to affect the nature of the property which could be the subject of that crime. Therefore, in the absence of a statute to the contrary, it is generally held that no property can be the subject of embezzlement that is not the subject of larceny.

168. **The intent.**—To constitute embezzlement there must be a fraudulent intent to convert the property to the taker's use and to deprive the owner of it. The same principles apply, therefore, as in larceny, it being a good defense to show that the property was converted by mistake, either of fact or of law, or under a claim of right.

169. **Statutory larceny by bailee.**—We have seen that at common law it was not larceny for a bailee or any person to whom the possession of property had been entrusted by the owner to convert the property to his own use, if at the time he obtained possession he had no intent to convert, and if he did not break bulk. Statutes now very generally exist supplying this defect in the common law.

Some of these statutes are couched in general terms and apply to all bailees, others apply only to certain classes of bailees. The statutes, being penal, are generally strictly construed, and the term bailee held to apply only to one who is a bailee in the ordinary legal meaning of the term.

As said by Trunkey, J., in Krause v. Commonwealth:[65] "Our statute, as shown by Read, J., in

[65] 93 Pa. 418.

Commonwealth v. Chathams, 14 Wright 181, is taken from the English statute; and in that case the interpretation of the words bailee and bailment, as fixed by the English decisions, was adopted, which decisions were cited, showing that the words must be interpreted according to their ordinary legal acceptation; that 'bailment relates to something in the hands of the bailee, which is to be returned in specie, and does not apply to the case of money in the hands of a party who is not under any obligation to return it in precisely the identical coins which he originally received;' that 'to bring a case within this clause, in addition to the fraudulent disposal of the property, it must be proved: First, that there was such a delivery of the property as to divest the owner of the possession, and vest it in the prisoner for some time; secondly, that at the expiration or determination of that time the same identical property was to be restored to the owner.'

"The term bailee is one to be used, not in its large, but in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods bona fide, and then fraudulently convert. Where it does not appear that a fiduciary duty is imposed on the defendant to return the specific goods of which the alleged bailment is composed, a bailment under the statute is not constituted."

In some jurisdictions a broader meaning has been given to the word bailee, and a bailment is held to exist though the specific property bailed is not to be

returned to the bailor. Thus, in Regina v. Aden,[66] A placed a sum of money in the hands of the prisoner to be used in purchasing coal for A. The prisoner did not buy any coal, but paid away part of the money in satisfaction of a debt owed by him. This was held to be larceny by bailee, though the money was not to be returned to A.

170. **Cheating—Elements of the crime.**—Cheating was an offense at common law if it was effected by means of a false token. Where the cheat was such that common prudence could guard against it, the person defrauded was left to a civil action for redress; it was not indictable. But where false tokens, such as false weights or measures, were used to effect the imposition, an indictable offense was committed, it being considered that ordinary care and prudence could not guard one against such form of fraud.

In Commonwealth v. Warren,[67] Warren obtained a pair of shoes from the prosecutor, on credit, by certain false pretenses. He was convicted under an indictment for cheating, but judgment was arrested, the court holding his conduct did not constitute this offense.

In Rex v. Wheatly,[68] Wheatly, being a common brewer, was indicted because he, intending to cheat and defraud one Webb, delivered to him sixteen gallons of beer, for and as eighteen gallons. Being convicted, the judgment was arrested. Jus-

[66] 12 Cox C. C. 512 (Eng.).
[67] 6 Mass. 72, LEADING ILLUSTRATIVE CASES.
[68] 2 Burr. 1125 (Eng.).

tice Wilmot said: "In the case now before us the prosecutor might have measured the liquor before he accepted it, and it was his own indolence and negligence if he did not. Therefore, common prudence might have guarded him against suffering any inconvenience by the defendant's offering him less than he had contracted for." This case is considered a leading case on the subject.

171. **Same subject—Use of false tokens.**—If, however, false tokens are used, the cheat is indictable. In Respublica v. Powell,[69] Powell, a baker employed by the army, was indicted for cheating in selling 219 barrels of bread marked as weighing eighty-eight pounds each, whereas they only, severally, weighed sixty-eight pounds. This was held to be indictable, the court saying: "This was clearly an injury to the public, and the fraud the more easily to be perpetrated, since it was the custom to take the barrels of bread at the marked weight without weighing them again. The public could not, indeed, by common prudence, prevent the fraud." So, if the brewer in Rex v. Wheatly, cited above, had not merely delivered less beer than was paid for, but had used a false measure in measuring it, he would have been indictable. A false token is somewhat difficult to define. It is said by one judge to be one "that is, of itself, of a public character, so as to put at hazard and peril the public interest or safety in the general trade of the state. For such a purpose the false token must have the ostensible appearance of a public instrument calculated to de-

[69] 1 Dall. 47 (Pa.).

ceive."[70] A false token was defined by O'Neall, J., as follows: "It is anything which has the semblance of public authority, as false weights, measures, seals, and marks of produce and manufactures, false dice, marked cards, and things of a similar kind, false and deceptive, used in unlawful games."[71] Thus it has been held that a promissory note is not a token, and that money obtained by a fraudulent use of it is not an indictable cheat.[72] So of a banker's check.[73]

[70] Richardson, J., in State v. Stroll, 1 Rich. 244 (S. C.).
[71] O'Neall, J., in Middleton v. State, Dudley 275 (S. C.).
[72] Middleton v. State, Dudley 275 (S. C.).
[73] Rex v. Lara, 6 T. R. 565 (Eng.).

CHAPTER XXIII.

OBTAINING PROPERTY BY FALSE PRETENSE.

172. **The statutes creating the crime.**—The crime of obtaining goods by false pretense is a statutory one. The statutes creating this crime were passed to remedy a defect in the law of larceny. We have seen that if a person induced another to sell to or otherwise vest property in him, the intention of the owner being to part with the title as well as the possession of the property, the person receiving the property was not guilty of larceny, even though he induced the owner to part with it by means of a false pretense. The reason being that since the person receiving the property obtained title to it, any conversion of it by him was a conversion of his own property, not of another's. To meet this difficulty the statutes of false pretenses were enacted.

The original English statute provided: "Forasmuch as many light and evil-disposed persons, not minding to get their living by truth according to the laws of this realm, * * * knowing that if they come to any * * * goods, chattels, and jewels by stealth, that then they, being thereof lawfully convicted according to the laws of this realm, shall die therefor, have now of late falsely and deceitfully contrived, devised, and imagined privy tokens, and counterfeit letters in other men's names, unto divers persons, their special friends and acquaint-

ances, for the obtaining of money, goods, chattels, and jewels of the same persons: * * * Be it ordained * * * that if any person or persons falsely and deceitfully obtain or get into his or their hands or possession, any money, goods, chattels, jewels, or other things of any other person or persons, by color and means of any such false token or counterfeit letter, every person or persons so offending, and being thereof lawfully convicted, * * * shall suffer," etc. A later statute extended the means used to include any false pretense. These statutes have been the models for similar statutes in this country, though the statutes here vary in language in the different states.

173. **The property obtained.**—In People v. Cummings,[74] defendant was accused, by information of the crime, of obtaining property by false pretenses, under § 532 of the Penal Code—the property charged to have been obtained being described as two certain parcels of land. He demurred to the information as not stating an offense. The demurrer was sustained, and the people appealed. The court said: "Our American statutes upon the subject have all followed more or less closely those of England—some instead of employing the specific terminology of the English statutes in designating the character of the property made the subject of the offense, have used more comprehensive terms—in their interpretation, however, of the purpose and effect of these statutes, the American courts, by reason, no doubt, of the origin of the offense, and in obedience to a

[74] 114 Cal. 437.

well-established rule of statutory construction, have closely followed, in a general way, that of the English courts, and the statutes of the various states, however general their terms, have been uniformly held to apply only to personal property of a larcenous nature."

The rule laid down above has been generally followed in this country. In accordance therewith it has been held that one does not commit this crime who obtains, by false pretense, a receipt for a debt,[75] or an indorsement of credit on a promissory note, where the statute makes "money, goods, or other property" the subject of the offense,[76] for "no harm is done by such an act—the credit is a mere intangible thing of no value." An obtaining of board and lodging has been held not to be within a statute punishing the obtaining of "money, goods, wares, merchandise, or other property."[77] But some states have provided specifically for obtaining board and lodging.[78] Some statutes include the obtaining of a person's signature to certain instruments.[79] Some statutes make "any valuable thing" the subject of this offense. This term has been held not to include a receipt for a debt;[80] nor a chose in action which cannot be so used as to become valid against the signer if he proves that it was criminally obtained from him.[81]

[75] Moore v. Commonwealth, 8 Pa. 260, LEADING ILLUSTRATIVE CASES.
[76] State v. Moore, 15 Iowa 412.
[77] State v. Black, 75 Wis. 490.
[78] See State v. Kingsley, 108 Mo. 135.
[79] See State v. Alexander, 119 Mo. 447; State v. Clark, 72 Iowa 30.
[80] Moore v. Commonwealth, 8 Pa. 260, LEADING ILLUSTRATIVE CASES.
[81] Robinson v. State, 53 N. J. L. 41.

174. **The interest acquired.**—The legal interest acquired in the property obtained must be nothing less than the title. If the owner intends to part only with the custody or the possession of the property and not with the title, the person obtaining by false representations is guilty of larceny if he converts the property, but not of obtaining it by false pretense. In Canter v. State,[82] the defendant went to a store pretending that he wished to buy a suit of clothes. Upon his pretense that he could not try on the clothes at the store, the owner permitted him to take them away for the purpose of trying them on, upon his promise to return them; the defendant at the same time falsely stating that one A owed him four dollars and would come and buy the clothes and pay for them. The defendant did not return with the clothes. This was held not to be an obtaining by false pretense, since the owner, at the time of delivering the property, did not intend to part with the title to it at that time, but only with the possession, the title being intended to pass only when A paid for the clothes.

175. **The pretense—Falsity of—Form of.**—*The falsity of the pretense.* The pretense made by the prisoner on which the property is obtained must be false, otherwise the crime is not committed. An extreme illustration of this is found in the case of Rex v. Spencer.[83]

In this case the prisoner gave the prosecutor a note on the X bank in payment for meat, knowing

[82] 7 Lea 349 (Tenn.).
[83] 3 Car. & P. 307 (Eng.).

that the X bank had stopped payment and that two of the three partners in the bank had become bankrupt. It appearing, however, that the third partner was not bankrupt, it was held that the prisoner could not be convicted, for as the note might ultimately be paid it did not appear that his representation that the note was good, was false. If the pretense is not in fact false it is immaterial that the defendant believed it to be false at the time he made it.[84] In the case last cited, A, having mortgaged certain property to B, induced C to sell him several mules on credit, giving C a mortgage on the same property mortgaged to B, and stating, in the presence of B, that there was no encumbrance on the property. On an indictment for obtaining the mules by the false statement that the property was not mortgaged, the court held that as the statement was made in the presence of B, without B's dissent, B thereby waived the priority of his lien on the property, hence A's statement that there was no encumbrance on the land was true, and he could not be convicted of obtaining the mules by false pretense.

Not only must the pretense be false when made, it must also be false when the property is obtained, otherwise the crime is not committed, for the gist of the crime is the obtaining of the property by the false pretense, and the property is not obtained by this means if the pretense is not false. In People v. Wheeler,[85] A induced B to buy a lot, telling B

[84] State v. Asher, 50 Ark. 427.
[85] 169 N. Y. 487.

that he (A) was the owner thereof. A was not the owner at the time, but later, and before B paid him for the lot, he became owner. The court held that there could be no conviction of A. The court said: "It is not the law of this state, as we understand it, that a man may be guilty of larceny by false pretense because he has not title to either real estate or personal property which he undertakes to sell, or says he owns, provided he vests good title in the purchaser at the time he pays the consideration for the property. If a party represents that he has title to property when he knows he has not, and by reason of such representation secures the agreed price without vesting, or intending to vest, title in the would-be purchaser, the crime, of course, is made out. But there can be no larceny, by false pretense or otherwise, where the purchaser gets precisely what he deliberately bargains for, and for a price which he agrees to pay, knowing fully the character and value of the property," the representation being true when the money was obtained.

Form of pretense in general. As a general rule the form of the false pretense is immaterial. It may be oral, or made in writing, or consist in conduct without words either spoken or written. The false representation, however, must be a representation of an existing or past fact.

176. **A promise as a pretense.**—A promise, not being a statement of an existing or past fact, is not such a false pretense or representation as to come within the statute. In Rex v. Douglas,[86] the prose-

[86] 1 M. C. C. 462 (Eng.).

cutor, having lost a mare and gelding, went in search of them to L, where the prisoner, on being introduced to the prosecutor, said he would tell him where they were if he would give him a sovereign; the prosecutor hesitated to give him a sovereign, but the prisoner refusing to give the information unless the sovereign was delivered into his hands, the prosecutor reluctantly put two half-sovereigns into his hand, which the prisoner immediately put into his pocket. The prosecutor then required the prisoner to give him the information he had promised, which he refused to do or to return the money, saying he had no information to give him. The jury having found the prisoner guilty, in a case reserved upon the question whether this was a false pretense, the conviction was quashed on the ground that the indictment should have stated that the prisoner pretended he knew where the horses were. This would then have been a statement of a fact; but saying he would tell where they were was only a promise.

177. Representation as to the future.—A representation as to future events is not a false pretense within the statute. In Regina v. Woodman,[87] the indictment charged W with having obtained a sum of money from A by falsely representing to A that he (W) wanted the money to enable him to rent a public house at X, whereas W was not going to rent the public house at X. It was held that this was a mere promissory statement—a statement of what W intended to do in the future—and not within

[87] 14 Cox C. C. 179 (Eng.).

the statute. In Regina v. Lee,[88] the prisoner, who owed his landlord some rent, said to the prosecutor: "I am going to pay (or I have got to pay) my rent to the squire on the first of March. Will you advance me £10, and I will give you a note for it to make it all business-like." The prosecutor, thinking the prisoner wanted the £10 to pay the rent, lent him the money. The prisoner meant to leave the country the next day and defraud the prosecutor of the money. The jury found that the statement of the prisoner—that he was going to pay his rent—was false. The court held that there was no false pretense as to any existing fact, but merely as to something to happen in the future, and reversed the conviction.

If, however, there is a false statement as to an existing or past fact, it will not be the less a false pretense because it is combined with a promise or a statement as to the future. Thus, in an indictment for obtaining money by false pretense, it appeared that the prisoner, who had a wife living, had represented himself to the prosecutrix as a single man, and pretended that he would marry her; he induced her to lend him some money to enable him to rent and furnish a house for them to live in. He never returned with the money. The prosecutrix testified that she lent him the money on his representation that he was a single man as well as on his representation that he would marry her and use the money in furnishing the house. It was held that though he could not be convicted on the

[88] Leigh & Cave 309 (Eng.).

statements that he would marry her, or that he intended to use the money to furnish the house, as the one was a promise and the other a representation as to something in the future, yet he could be convicted on his representation that he was a single man, as that was a statement as to an existing fact.[89] If A should say to B, "Lend me five dollars, I will pay you to-morrow," this would not be a false pretense, though A never intended to repay the loan; but if he should say, "Lend me five dollars, I have the money in the bank and will repay you to-morrow," and he had no money in the bank, this would be a false pretense.[90]

If the prisoner should say, "I am going to get up a directory and will put your name in it for one dollar," this would not be an indictable pretense. But if he said, "I am getting up a directory," this is a statement of an existing fact and would be indictable if untrue, and if the money was obtained by means of it.[91]

178. **Statement of intention, opinion, and belief.** —*Intention.* Suppose A, intending to defraud B, says to B, "I intend to open a store; lend me $100 to buy a stock of goods." Is this a false pretense? On the one hand, it may be said that this is a false representation of an existing fact, viz.: A's intention—the state of his mind. Some few courts have so held, one judge saying that the state of a man's mind is as much an existing fact as the state of his

[89] Regina v. Jennison, Leigh & Cave 157 (Eng.).
[90] See Rex v. Gordon, 23 Q. B. D. 354 (Eng.).
[91] Regina v. Speed, 15 Cox C. C. 24 (Eng.).

digestion.[92] On the other hand, it is said that a statement of intention is a mere statement of what one will do in the future, and is not a representation of an existing fact, and therefore not an indictable false pretense.[93]

Opinion or belief. A mere statement of one's belief or opinion is not within the statute; an opinion being held not to be a fact, as, indeed, many opinions are not. It is, however, sometimes difficult to determine whether a certain statement is a statement of an opinion or belief merely, or a statement of fact. In People v. Gibbs,[94] Gibbs obtained money from A by representing that land and a mortgage thereon were good and sufficient security for the payment of the money borrowed. The court held that this representation was a mere matter of opinion, and not indictable. The distinction between a statement of an opinion and of a fact is sometimes difficult to draw. In State v. Hefner,[95] H was indicted for obtaining money by false pretenses. The pretenses alleged were that he said of a mare which he exchanged with the prosecutor, that her eyes were sound and there had never been anything the matter with them. The court said: "If he had simply stated that the eyes of the mare were sound, this would have been nothing more than an expression of an opinion, which we think would not have come within the statute; but when he says

[92] Commonwealth v. Walker, 108 Mass. 309.

[93] Regina v. Woodman, 14 Cox C. C. 179 (Eng.); Commonwealth v. Moore, 99 Pa. 570.

[94] 98 Cal. 661.

[95] 84 N. C. 751.

that there never has been anything the matter with them, this is a fact, and when it is negatived and proved that her eyes were diseased, and had been operated upon for the 'hooks,' within the knowledge of the defendant, it is a false representation of a fact, and is a false pretense within the statute."

179. **Puffing statements.**—Mere exaggerated statements made by a seller in puffing his wares for the purpose of inducing the buyer to purchase, are held not to amount to false pretenses. As said by Campbell, C. J., in Regina v. Bryan:[96] "It seems to me it never could have been the intention of the legislature to make it an indictable offense for the seller to exaggerate the quality of that which he is selling, any more than it would be an indictable offense for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to that which they really were."

In People v. Morphy,[97] the defendant represented that his firm was "first class" and that he had no rent to pay and no expenses to pay, and that he could sell and deliver groceries twenty-five per cent cheaper than they could be purchased in Modesto. The court held these statements did not amount to false pretenses within the statute. The court said:

"It may be conceded that representations calculated to make intending purchasers believe that a particular merchant can sell goods cheaper than

[96] 7 Cox C. C. 312 (Eng.), LEADING ILLUSTRATIVE CASES.
[97] 100 Cal. 84.

others, when it is not so, do not rank very high in the scale of morality; but if the representations here are criminal false pretenses, a crime is paraded in numerous show windows in every city. Perhaps this is not an argument of a very high order, but it does tend to prove that such 'tricks of the trade' were not intended to be included in the statute where there is no false representation as to the character, quality, or quantity of the merchandise. Customers are presumed to have some knowledge of the value of what they purchase, and can always inquire before purchasing as to market values."

Where puffing ends, and statement of facts begins, it is sometimes difficult to determine; nevertheless, if this line is passed the case is within the statute. In State v. Paul,[98] the defendant's representation was that certain land that he sold to the prosecutor was "well wooded and well timbered, and had upon it a valuable growth of hard and soft wood and hemlock bark, and contained about one hundred acres." The court held that these representations were not within the statute. The court said: "What would be a valuable growth upon land, or a well-wooded or timbered tract, is a very uncertain thing. The terms are indefinite. What one man would regard as valuable another might not." On the other hand, in Parks v. State,[99] where the defendant in selling a cow falsely represented her as having a certain milk-yielding capacity, it was held that such representations were matters of fact,

[98] 69 Me. 215.
[99] 94 Ga. 601.

and not mere puffing statements, and that he should be convicted.

180. **Statements as to quality.**—Representations as to the quality of goods are usually held not to be within the statute, either because they are regarded as mere puffing statements, or because they are regarded as expressions of opinion and not of fact. If, however, the representations amount to a statement of fact, or go to the identity or species of the article, they are within the statute, and indictable. The difference is well brought out by comparing the two cases of Regina v. Bryan,[1] and Regina v. Ardley.[2] In Regina v. Bryan, the defendant induced a pawnbroker to advance money on some spoons by representing that the spoons "were of the best quality; that they were equal to Elkinton's A; that the foundation was of the best material and that they had as much silver on them as Elkinton's A." The court held that these statements were not within the statute. Campbell, C.J., thought these statements were mere puffing statements, and said: "I find no case in which it has been held that a mere misrepresentation, at the time of the sale, of the quality of the goods, has been held to be an indictable offense."

In Regina v. Ardley, the defendant induced a jeweler to advance him money on a chain. He said, "The chain is 15 carat fine gold, and you will see it stamped on every link. It was made for me and I paid nine guineas for it. The maker told me it was

[1] 7 Cox C. C. 312 (Eng), LEADING ILLUSTRATIVE CASES.
[2] 12 Cox C. C. 23 (Eng.).

worth £5 to sell as old gold." The prisoner was convicted. The court said: "The statement here made is not in form an expression of opinion or mere praise. It is a distinct statement accompanied by other circumstances, that the chain was 15 carat gold. That statement was untrue, was known to be untrue, and was made with intent to defraud. How does that differ from the case of a man who makes a chain of one material, and fraudulently represents it to be of another? The case differs from Reg. v. Bryan, because here there was a statement as to a specific fact within the actual knowledge of the prisoner, namely, the proportion of pure gold in the chain."

181. **Statements as to ability.**—A statement that the person obtaining the property has power, ability or authority to do a certain act, is within the statute. Thus a representation that the accused has the ability to secure a position for the prosecutor, is a pretense of an existing fact within the meaning of the statute.[3] So is a representation that the accused is the agent of another and has authority to act for that other.[4] In Commonwealth v. Keeper of the County Prison,[5] the accused represented to the prosecutor that he had the supernatural power to call up the spirits of deceased persons. By this pretense he obtained property from the prosecutor. This was held to be obtaining property by false pretense.

182. **Pretense by conduct.**—The false pretense

[3] Commonwealth v. Murphy, 96 Ky. 28.
[4] State v. Phifer, 65 N. C. 321.
[5] 15 Wkly. Notes Cas. 282 (Pa.).

need not be made by words; conduct may amount to a false pretense. In Regina v. Bull,[6] the prisoner on entering the service of a railway company signed a book of rules, a copy of which was given him. One of the rules was, "No servant of the company shall be entitled to claim payment of any wages due him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving the service the prisoner fraudulently delivered up to an officer of the company, as part of his uniform, a coat belonging to a fellow-servant, and so obtained the wages due him. It was held that he was properly convicted of obtaining these wages by false pretense, although he said nothing at the time as to whom the coat belonged.

183. **Tendency of the statement to deceive.**—It is held by some courts that the pretense, to be indictable, must be of such a character as is calculated to impose on a person of ordinary prudence and caution. In the case of Commonwealth v. Norton,[7] the indictment charged Norton with obtaining four dollars and eighty cents from A by representing to A that he (Norton) had been a few days previous in A's saloon, had had two drinks, and gave A five dollars from which A was to take twenty cents, but that A did not return any change. The court in arresting judgment said: "The case as presented by the indictment is the naked case of a wilfully false affirmation, made to a party who had like means of knowledge whether the affirmation was true or false as the

[6] 13 Cox C. C. 608 (Eng.).
[7] 11 Allen 266 (Mass.).

party who made it. * * * Although the language of the statute is very broad, and in a loose and general sense would extend to every misrepresentation, however absurd or irrational or however easily detected, yet we think the true principles of construction render some restriction indispensable to its proper application."

Other courts put no such restriction on the kind of pretense used, but hold that if the pretense did in fact deceive the prosecutor and cause him to part with his property it is immaterial whether the pretense was calculated to deceive an ordinary person or not, or whether the prosecutor could have ascertained its falsity or not. In People v. Bird,[8] the defendant obtained money from the prosecutor by representing that he was an apostle of Christ; that he was to be the judge of the people in that part of the country on the day of judgment; that the Lord had sent him to the prosecutor to tell him these things; and that the Lord required the prosecutor to pay him $300 to make a home for him. The court held that no matter how absurd and irrational these pretenses were, the defendant could be convicted.

184. **Effectiveness of the pretense.**—Not only must there have been a false pretense as described above, and an obtaining of the goods, but the goods must have been obtained by means of the false pretense. In other words, the prosecutor, in parting with the goods to the defendant, must have done so because of the pretense and relying on it. If the

[8] 126 Mich. 631.

reason inducing the prosecutor to part with the goods was something other than the pretense, the crime was not committed. In Regina v. Mills,[9] M was convicted for obtaining 10 shillings 6 pence from A by falsely representing to A that he (M) had cut sixty-three fans of chaff, he being employed by A to cut chaff at two pence per fan. It appeared that when A paid M the 10 shillings 6 pence he knew that M had cut only forty-five fans, but notwithstanding this knowledge he paid M the amount asked. Cockburn, C. J., in quashing the conviction said: "The question in these cases is, whether the false representation is the immediate motive operating on the mind of the prosecutor, and inducing him to part with his money. It cannot be said that that was the case here, because he paid the money although he knew the representation to be false. Unless the money be obtained by the false pretense, it is an attempt only. If the prosecutor investigates for himself the representations made, and parts with the goods, relying on his own investigation, the crime is not committed though the representations are false, for in such a case the goods are not obtained by means of the false pretense."

The false pretense need not, however, be the only inducement causing the prosecutor to part with the goods. In Regina v. English,[10] the prosecutor was a brick-maker. He proposed to buy a field from the defendant. He was shown over the field, and inspected the earth and soil, also examining a clump

[9] 7 Cox C. C. 263 (Eng.).
[10] 12 Cox C. C. 171 (Eng.).

of bricks on the field. The defendant told him that these bricks had been made out of the earth of the field. This statement was false. The jury found that the prosecutor was not influenced solely by means of the false statement, but that the statement materially influenced him. This was held sufficient to convict.

185. **Remoteness of the pretense.**—It is said in the books that if the pretense be too remote, there can be no conviction. In Regina v. Harty,[11] the defendant, on June 17th, by falsely representing that he was the owner of a certain vessel, obtained a coal charter from X. On October 9th, after several intervening voyages, the defendant obtained goods and supplies for the vessel from X without any further representations as to the ownership of the vessel. It was held that defendant could not be convicted of obtaining the goods by means of the false pretense as to the ownership of the vessel. In Regina v. Bryan,[12] the defendant went to a lodging house kept by the prosecutor and falsely represented that he was a member of the naval reserve, and was entitled to receive next day 30 shillings for a quarter's payment. Believing this representation, the prosecutor agreed to let him have board and lodgings at his house for a week for 14 shillings. The prisoner then said he was short of cash, and asked the prosecutor to lend him 6 pence, which he did. The court ordered an acquittal, saying: "Although the prisoner obtained money or goods from the prosecutor, he did

[11] 31 Nova Scotia 272.
[12] 2 Fost. & F. 567 (Eng.).

it by means of a contract and he obtained the contract only by means of the false pretense. It is too remote to say he obtained the goods or money by false pretense."

The mere fact that some time has elapsed between the making of the false pretense and the obtaining of the property does not procure acquittal on the ground that the pretense was too remote. In Regina v. Welman,[13] the prisoner in July called upon the prosecutrix and made false representations relative to a benefit club, but failed on this occasion in obtaining any money from her. In August he again called relative to the club, and referred to the previous conversation, and obtained money. It was held that the jury might consider the first and second conversation as connected, and as forming one continuing representation.

186. **The intent to defraud.**—In order to constitute this crime there must be an intent on the part of the accused to defraud the prosecutor. For this reason it has been held that inducing the prosecutor to pay a note by pretending that the note is lost, does not make the accused guilty of obtaining by false pretense.[14] As the attempt was only to make the prosecutor pay a just debt, there was no intent to defraud him. In Rex v. Williams,[15] the prosecutor owed a debt of which the creditor could not obtain payment. Defendant, a servant of the creditor, went to the prosecutor's wife, and obtained two sacks of

[13] Dears. C. C. 188 (Eng.).
[14] People v. Thomas, 3 Hill 169 (N. Y.).
[15] 7 Car. & P. 338 (Eng.).

malt from her, saying, falsely, that his master had bought them of the prosecutor. Defendant knew this to be false, but took the malt to his master to enable him to pay himself the debt. It was held that if defendant did not intend to defraud the prosecutor, but merely to put it into his master's power to compel the prosecutor to pay the debt, he could not be convicted of obtaining the malt by false pretense.

The intent need not be to defraud the ultimate owner of the goods. It is sufficient if it be to defraud the person in lawful possession, or who parts with the property in reliance on the false pretense. If the intent to defraud be present, it is not necessary that the intent be to cause ultimate loss to the prosecutor. Thus the intention to return, at a future time, the money obtained, is no defense.[16] Nor need the intent be to deprive the prosecutor of the entire property obtained. It is sufficient if it be to deprive him of a part.[17]

187. **The intent to obtain the property.**—It is not sufficient that the property was obtained by means of a false pretense, it must also appear that the false pretense was made for the purpose of obtaining the property and not with some other purpose. In Rex v. Wakeling,[18] the defendant, having been ordered to go to work by the overseer of the poor of a parish from whom he had received help, informed the overseer that he could not go to work as he had no shoes.

[16] People v. Wieger, 100 Cal. 352, 34 Pac. 826.
[17] Regina v. Leonard, 3 Cox C. C. 284, 1 Den. C. C. 304 (Eng.).
[18] 1 Russ. & R. 504 (Eng.).

Relying on this statement, the overseer gave him a new pair of shoes. The statement was false, the defendant at the time having two new pairs of shoes that had been furnished him by the parish. On an indictment for obtaining the pair of shoes last given him by false pretense, it was held that he could not be legally convicted, as his false statement was not made for the purpose of obtaining the shoes, but for the purpose of obtaining exemption from work.

To constitute the crime there must be also knowledge on the part of the accused that the pretense he is making is false, since otherwise there can be no intent on his part to obtain the goods by means of the false pretense. It has been held, however, that to make a representation recklessly, and without knowledge justifying a belief in its truth, is equivalent to making it knowing it to be false.[19]

[19] People v. Cummings, 123 Cal. 269, 55 Pac. 898.

CHAPTER XXIV.

RECEIVING STOLEN GOODS.

188. **Elements of the crime.**—At common law a person knowingly receiving stolen goods was not an accessory after the fact to the larceny of the goods, because, as we have seen in discussing accessories, an accessory must give personal aid to the thief himself. If the owner received back his own goods from a thief without any agreement not to prosecute, it was lawful, but if he received them upon an agreement not to prosecute the thief, this was criminal, and was called theft-bote. But now by statute in England and in our states receiving stolen goods is a substantive offense.

To constitute the crime of receiving stolen goods, the goods must be stolen goods, they must be taken into the possession of the receiver, the receiver must know they have been stolen, and he must receive them with fraudulent intent.

189. **Character of the goods.**—In order to convict a person of receiving stolen goods, it must appear that the goods were stolen. And not only must they have once been stolen, they must bear the character of stolen goods at the time they were received. If it is proved that they have never been stolen—even though the receiver thought they had been—or if, though once stolen, they have ceased to be stolen goods, there can be no conviction for this crime.

This is clearly shown by the case of Regina v. Dolan.[20]

In this case A stole goods from B. B found them on A and sent for a policeman who took charge of them. The owner then sent the thief to sell the goods to X, to whom A had before disposed of stolen goods. The thief took the goods to X's shop, sold them to X, who knew they had been stolen, and took the money back to the owner of the goods.

On an indictment of X for receiving stolen goods, it was held he could not be convicted. Campbell, C. J., said: "I do not see how it could be supported unless the doctrine were laid down that if at any period of the history of a chattel, which has been stolen and has been restored to the owner, who has long had it in his possession, the same chattel should be received from the owner by a person who knew that it had been once stolen, such a receiving would be an offense within the statute. I think such a receiving could never be said to be an offense within the statute, any more than it could make the receiver an accessory at common law to the felony. If an article once stolen has been restored to the master of that article, and he, having had it fully in his possession, bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods, within the meaning of the Act? In this case the owner had possession of the goods just as much as if he had taken them into his own hands, and had delivered them from his own possession to another

[20] Dears. C. C. 436 (Eng.).

person for a particular purpose. He was the bailor of the goods subsequently to the theft, and the other person was the bailee. After that the goods are carried by the thief by the direction of the master of the goods to the prisoner, who receives them. That is not a receiving within the meaning of the Act."[21] Many statutes now make the receiving of goods not only stolen, but "extorted," "obtained," "embezzled," or "disposed of," a crime.

190. **Obtaining possession.**—To be guilty of receiving, the accused must come into possession. In Regina v. Hill,[22] A and B stole some fowls. A sent them by coach, in a hamper without a direction, to Birmingham, stating that a person would call for them there. C, the wife of A, called at the coach house at Birmingham, and inquired for the hamper. The hamper was shown her, and she claimed it as the package for which she had come. Upon this she was arrested. It was held that C could not be convicted of receiving the hamper. The court said: "The prisoner never did in fact receive the fowls, nor ever had the power of doing so. Whoever had possession of the fowls at the coach office, when the prisoner claimed to receive them, never parted with the possession, and the prisoner was immediately taken into custody. The prisoner by claiming to receive the fowls, which never were actually or potentially in her possession, never in fact or law received them, therefore the conviction was wrong."

[21] See also Regina v. Schmidt, 10 Cox C. C. 172, LEADING ILLUSTRATIVE CASES.

[22] 1 Den. C. C. 453 (Eng.).

The goods, however, need not come into the physical possession of the accused. He may receive by the hands of an agent, and if the goods come into the actual possession of the agent, it is sufficient. Thus where A stole hogs, and B requested X to take them to a certain place and X took possession of them for this purpose, it was held that this was a receiving by B, though the hogs had never been in the actual possession of B, the possession of X being the possession of B.[23]

191. **From whom received.**—It has been held that receiving stolen goods not from the thief, but from one who has received them from the thief, is not a receiving of stolen goods. As said by Niblack, J., in Foster v. State,[24] "To render the offense of receiving stolen goods possible, the goods must retain their stolen character at the time the party charged received them. If, therefore, the goods have been transferred from the thief to a guilty receiver, the latter takes as a receiver, and not as a thief. In his hands, and as to him, the goods are not stolen. In his hands, the character of the goods is derived from his offense, and not from the offense of the person who stole them, so that one who receives such goods from him, however wickedly, is not guilty of receiving stolen goods within either the common law, or statutory definition of that offense, unless such second or subsequent receiver receives the goods under circumstances which connect him with the thief." This is denied in some cases. In Anderson

[23] State v. Stroud, 95 N. C. 626.
[24] 106 Ind. 272.

v. State,[25] it was said: "Our statute (Rev. Stat., § 2451) provides that 'whoever buys, receives, or aids in the concealment of stolen money, goods or property, knowing the same to have been stolen, shall be punished. * * *' The offense denounced by the statute is not buying, receiving, etc., stolen property from the thief himself or from any particular person, but buying or receiving, etc., such property, knowing it to be stolen from any person whatsoever." The question depends somewhat on the wording of the statutes.

192. **Knowledge.**—Knowledge on the part of the receiver that the goods are stolen goods is an essential element of the offense. Proof of any facts which show that the defendant did not have such knowledge is therefore a complete defense. Not only is such knowledge essential, but it is also essential that the receiver have such knowledge at the time he receives the goods. Merely retaining goods which he has ignorantly received into his possession, after he has become aware that the goods were stolen, is not sufficient to make the receiver guilty of this crime.[26] Whether the defendant knew at the time he received the goods that they were stolen, is a question of fact for the jury to determine, and it has been held that the jury are justified in finding such knowledge from proof that he received the goods under such circumstances as would lead a reasonable man to know that they were stolen.[27]

[25] 38 Fla. 3.

[26] State v. Caveness, 78 N. C. 484.

[27] See Regina v. White, 1 Fost. & F. 665 (Eng.); Commonwealth v. Finn, 108 Mass. 466.

193. **Intent.**—In this crime, as in others dealing with the fraudulent handling of property, there must be a fraudulent intent, as well as a knowledge that the goods are stolen goods. If one receives them for a legitimate purpose, even though he knows they have been stolen he is not guilty of this crime. Therefore if the accused receives back his own goods, or receives them for the purpose of restoring them to the true owner without reward, the crime is not committed. If, however, the accused receives the goods intending to hold them to induce a reward from the owner;[28] or to receive a reward from the thief for the keeping;[29] or with the object of aiding the thief by concealing the goods, he is guilty of the crime.[30] Or if pursuant to an understanding with the thief, the receiver invite an interview with the owner, and obtain the goods for him, under a color of agency, but really to make a profit out of the larceny, he is a receiver within the statute.[31]

[28] State v. Pardee, 37 Ohio St. 63.
[29] People v. Wiley, 3 Hill 194 (N. Y.).
[30] Rex v. Richardson, 6 Car. & P. 335 (Eng.).
[31] People v. Wiley, 3 Hill 194 (N. Y.).

CHAPTER XXV.

ROBBERY.

194. **The elements of the crime.**—East defines robbery as "a feloniously taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear."[82] Robbery is an aggravated form of larceny, therefore the property which may be the subject of this crime is the same as that which may be the subject of larceny. It need not be such property only, however, as was the subject of larceny at common law. Any property which has been made the subject of larceny by statute is the subject of the crime of robbery also.[83]

Since robbery is larceny, and something more, all the elements that we have seen to be necessary to make larceny must be present also in robbery. There must be a caption—or taking of the goods, an asportation—or carrying away, and there must be the like intent as is necessary in larceny.

195. **Taking in the presence.**—In addition to the taking and carrying away necessary to constitute larceny, there must, to constitute robbery, be a taking from the person of another or in his presence. It is not robbery of A, therefore, to take the property of A from B if B is not in A's presence at the time

[82] 2 East, Pleas of the Crown, p. 707 (Eng.).
[83] See State v. Gorham, 55 N. H. 152.

of the taking. In Rex v. Fallows,[34] A and B were walking together, B carrying A's bundle, when C and D came up and assaulted A. B threw down the bundle and ran to the assistance of A, whereupon C took up the bundle and ran off with it. C and D were indicted for robbery of A. It was held that they could not be convicted of robbery, but only of simple larceny, as the thing stolen was not in the personal custody of A, nor was it taken in his presence. It did not appear how near A was to the bundle when it was taken.

When it is said, however, that the property must be taken in the presence of the owner, it is not meant that he must be physically present at the exact spot from which the property is taken. As said by East,[35] one is guilty of robbery when "having first assaulted another, he takes away his horse standing by him, or having put him in fear, drives his cattle out of his pasture in his presence; or takes up his purse which the other in his fright had thrown into a bush." In Regina v. Selway,[36] one prisoner struck the prosecutor, who was paralyzed and sitting on a sofa in a room, a violent blow on the head, while the other prisoner stole a cash box from a cupboard in another part of the room. It was held that the cash box was under the protection of the prosecutor, and the robbery was complete. It has been said that if the owner is in sight of his property it is in his presence.[37]

[34] 5 Car. & P. 508 (Eng.).
[35] 2 East, Pleas of the Crown, p. 707 (Eng.).
[36] 8 Cox C. C. 235 (Eng.).
[37] Roll, C. J., in Wright's Case, Styles 139 (Eng.).

196. **Same subject—Taking out of sight of owner.**—It has even been held that the property need not be within sight of the prosecutor, to be in his presence. In Clements v. State,[38] the prosecutor was in his smokehouse, within fifteen steps from his dwelling. One of the accused by threats prevented him from leaving the smokehouse, while another entered the dwelling, and stole property therefrom. This was held to be a taking in the presence of the owner. On the other hand, where thieves struck money out of the owner's hand, and by threats drove him off, so that he could not take it up, and then they took it up themselves, it not being found that they took up the money in the sight or presence of the owner, it was held there could be no conviction of robbery.[39] Of course, the defendants could be convicted of larceny in taking the money.

197. **Taking by violence.**—Though property be taken from the person or in the presence of the owner, it is larceny only, unless it be taken by violence, or by putting in fear. One of these two circumstances must characterize the taking to constitute robbery. In one sense there is violence in every taking of the property of another if that other do not consent to the taking. If A snatch a watch from the hand of B, or jerk B's hat from his head, the taking is in one sense done by violence. But to constitute robbery there must be some violence used by the taker other than that violence which is necessary merely to get the property from a non-consent-

[38] 84 Ga. 660.
[39] Rex. v. Francis, 2 East, Pleas of the Crown, p. 708 (Eng.).

ing owner, unless, indeed, some injury be done to the person.[40]

In Lapier's Case,[41] Lapier snatched an earring from the ear of the prosecutrix so suddenly that she had no time for resistance. The taking was done with such violence, however, as to tear her ear. This was held to be robbery, on account of the injury done to the person of the owner. So where a diamond pin was snatched from a woman's hair with such violence as to tear away part of her hair, a like conclusion was reached.[42] In State v. McCune,[43] the prisoner, meeting the prosecutor on the street, put his arm through the arm of the prosecutor, with the pretended purpose of guiding him to a livery stable. The prisoner then suddenly seized the watch of the prosecutor, which was in his vest pocket secured by a silk ribbon around his neck, and pulled with such violence as to break the ribbon. This was held to be robbery, though the prosecutor was not put in fear, enough violence being used not only to take the watch, but also to overcome the resistance made by the guard.

198. **Same subject—Resistance by owner.**—If the owner is not merely non-consenting, but in fact resists the taking, any force, however slight, used to overcome such resistance makes the taking robbery. In Williams v. Commonwealth,[44] the prosecutrix testified: "I was standing with my back to this man

[40] 2 East, Pleas of the Crown, p. 708 (Eng.).
[41] 1 Leach C. C. 320 (Eng.).
[42] Rex v. Moore, 1 Leach C. C. 335 (Eng.).
[43] 5 R. I. 60.
[44] 50 S. W. 240 (Ky.).

[the accused] and he came up behind me, and wrenched the pocketbook out of this left hand; and of course, he being stronger than I, I had to give way to him, and let him have it * * * that man took it by main force from my hand." This was held to be robbery.

Force to prevent resistance. The force necessary to constitute this crime may be used not only, as in the case cited, to obtain the property, but also to prevent resistance.

In Hughes' Case,[45] the prisoners hung around the prosecutor in the street, and rifled him of his watch and money. It did not appear that any actual force was used or any threats, but they so surrounded him as to render all attempt at resistance hazardous, if not vain. This was held robbery. Bayley, J., said: "If several persons so surrounded another as to take away the power of resistance, this is force."

Time force must be used. The force used must be employed before or at the time of the taking. If the property is obtained without the use of such force as is necessary to make robbery, force, no matter how great, used subsequently, as for example, to retain possession of the property taken, or to escape, or avoid arrest, will not constitute the taking robbery.[46]

199. **Putting in fear.**—To constitute robbery the property must be taken by force or by putting in fear. There need not be both force and fear. If either is present it is sufficient. If the thief obtains

[45] 1 Lewin C. C. 301 (Eng.).
[46] Colbey v. State, 46 Fla. 112.

the property by menaces or threats such as to excite reasonable apprehension of personal danger, it is robbery. Putting a person in fear of personal injury is sufficient to supply this element of the crime of robbery.[47] The fear need not be induced by words. If the acts of the accused are such as to excite reasonable fear of injury, it is sufficient. Thus if a person with a drawn weapon beg alms of another, who gives it to him through mistrust and apprehension of violence, this is robbery.[48]

The same is true though the thing taken were not within the contemplation of the taker when he made the assault. In Rex v. Blackham,[49] Blackham assaulted a woman with the intent to commit rape, and she without any demand from him offered him money, which the accused took, but continued to treat her with violence to carry out his original intent, until he was interrupted. This was held to be robbery, for the woman, from terror occasioned by the prisoner's behavior, offered the money which she would not have given voluntarily. If the property is obtained by threats, it is none the less robbery, because the accused offers to pay the owner a sum less than the value of the property.[50] It would seem that the fear of injury need not be of injury to the person from whom the goods are taken, but that if he deliver up the goods through a threat to injure a relative,[51] it is sufficient. Obtaining property by

[47] 2 East P. C. 711 (Eng.).
[48] 2 East P. C. 711 (Eng.).
[49] 2 East P. C. 711 (Eng.).
[50] 2 East P. C. 712 (Eng.).
[51] Rex v. Donnally, 2 East P. C. 713 (Eng.).

threats of injury to property is robbery; as where A obtained property from B by threatening to tear down his house.[52]

200. **Same subject—Fear of prosecution.**—Obtaining property by threatening to prosecute the owner for an offense if he does not yield the property, is said, in general, not to be robbery. The reason given is that a threat of imprisonment by law ought not to alarm any one's mind so as to cause him to part with his goods. If, however, any force, no matter how slight, is used, robbery is committed. In State v. Parsons,[53] defendant, pretending to be a policeman, took hold of the prosecutor, who was drunk, and told him he must go with him to jail, and that it was necessary to search him. Defendant searched him and took money from his pocket. He was convicted of robbery, the court saying, "It is enough that the prosecutor was intimidated and yielded up his property because of force used and threatened, be the same ever so slight."

If the threat employed be to accuse the prosecutor of an unnatural crime if he does not give up his property, it has been held to be robbery, irrespective of whether the prosecutor be guilty of the crime of which he is to be accused or not.[54] The reason why a threat to accuse a person of this offense is held to constitute robbery is, according to Hotham, B.,[55] that there is a fear of disgrace, if not of losing life, in being carried through the streets under a charge of

[52] Rex v. Simons, 2 East P. C. 731 (Eng.).
[53] 87 Pac. 349 (Wash.).
[54] Long v. State, 12 Ga. 293.
[55] In Donnally's Case, 1 Leach C. C. 193 (Eng.).

this nature, a fear which does not leave the party a free agent to resist or comply with the demand. In Long v. State,[56] it is said: "So abominable is the crime, and so destructive is even the accusation of it, of all social right and privilege, that the law considers that the accusation is a coercion which men cannot resist. This seems to be the only case in which a threat to prosecute will supply the place of actual force." It has been held that an extortion of money by a threat to accuse a person of this crime, is not robbery unless the threat were to accuse the very person from whom the property was obtained. Therefore obtaining money from a woman by threatening to accuse her husband, was not robbery.[57]

[56] 12 Ga. 293.
[57] Rex v. Edward, 1 Moo. & R. 257 (Eng.).

CHAPTER XXVI.

BURGLARY.

201. **Definition.**—Burglary is a common law offense. It is defined to be "the breaking and entering the mansion house of another or (as some say) the walls or gates of a walled town, in the night, to the intent to commit some felony within the same, whether the felonious intent be executed or not."[58] Burglary was a felony at common law.

202. **The breaking by force.**—"The term 'breaking' in this definition is a technical one, and signifies any disrupting or separating of material substances in any inclosing part of a dwelling house, whereby the entry of a person, arm, or any physical thing capable of working a felony therein may be accomplished. While the substance thus operated upon must be such as the law deems of the realty, the breaking does not necessarily imply an injury thereto."[59] "The degree of force or violence which may be used is not of importance,—it may be very slight. The lifting the latch of a door; the picking of a lock, or opening with a key; the removal of a pane of glass, and indeed, the displacement or unloosing of any fastening, which the owner has provided as a security to the house, is a breaking—an actual breaking—within the meaning of the term as em-

[58] 1 Hawkins, Pleas of the Crown, p. 285 (Eng.).
[59] 2 Bishop, Criminal Law, § 191.

ployed in the definition of burglary at common law, and as it is employed in the statute. In Hughes' case, 1 Leach, C. C., case 178, the prisoner had bored a hole with a centre-bit through the panel of the house door, near to one of the bolts by which it was fastened, and some pieces of the broken panel were found withinside the threshold of the door, but it did not appear that any instrument except the point of the centre-bit, or any part of the prisoner's body had been withinside the house, or that the aperture made was large enough to admit a man's hand. The court held that it was a sufficient breaking."[60]

Bishop gives the following illustrations of what constitutes a breaking, taken from the decided cases: Lifting the latch of a door, or pressing it open without any removal of the fastening; raising an unfastened window, or trap door; thrusting one's self down a chimney; or by fraud procuring the occupant of a house to open the door. But it is not a breaking to enter through an open window, door or other aperture, or to push further open a door or window already open in part.[61] It has also been held that crawling through a small hole under the floor,[62] or entering through a hole made for a belt operating machinery,[63] or lifting the flap of a cellar door usually kept down by its own weight, or pulling down an upper sash kept in place by its own weight,[64] is a breaking.

[60] Brickell, C. J., in Walker v. State, 63 Ala. 49.
[61] 2 Bishop, Criminal Law, § 91.
[62] Knotts v. State, 32 S. W. 532 (Tex.).
[63] Marshall v. State, 94 Ga. 589.
[64] Claiborne v. State, 83 S. W. 352 (Tenn.).

Breaking out. It is doubtful whether, if the entry were made without breaking, a breaking out in order to effect an escape, is burglary. In some states there are statutes making such a breaking burglary. In the absence of a statute, the courts are not agreed. Such breaking out has been held burglary in some states and not in others.

203. **The breaking by fraud.**—Effecting an entry by fraud is considered an entry by breaking, although the entry is made through an open door.[65] In the case last cited it appeared that thieves came by night to rob X and, finding the door locked, pretended that they came to speak with X, and so persuaded a servant to open the door and then they entered through the door. This was held burglary. It was said "getting the door opened by a false pretense, was *in fraudem legis* (legal fraud), and so they were guilty of burglary, though they did not actually break the house, for this was in law an actual breaking, as if a man pretend a warrant to a constable, and bring him along with him, and under that pretense rob the house, if it be in the night, this is burglary."

204. **The entry—By the person.**—There must be an entry as well as a breaking to constitute burglary. But, again, the term "entry" is a technical one; and that is regarded as an entry in law which would not in ordinary language be considered an entry. Thus it is not necessary, to constitute an entry, in burglary, that the whole body of the accused was within the house. If any part of the body

[65] Le Mott's Case, Kel. 42 (Eng.).

of the accused was within the house, it was an entry. In Rex v. Davis,[66] the prosecutor, Levyson, who dealt in watches and jewelry, stated that as he was standing opposite his shop he watched the prisoner, a little boy, standing by the window of the shop, and presently observed the prisoner push his finger against a pane of the glass in the corner of the window. The glass fell inside by the force of his finger. The prosecutor added, that, standing as he did in the street, he saw the forepart of the prisoner's finger on the shop side of the glass, and he instantly apprehended him. This was held to amount to an entry. It has also been held that the introduction of the hand of the accused between the glass of an outer window which he had broken, and an inner shutter was a sufficient entry to constitute burglary.[67]

205. **The entry—By an instrument.**—It is not even necessary that any portion of the body of the accused was within the house. The entry may have been made by means of an instrument. The distinction between entry by the person and entry by an instrument is well expressed by Patterson, J., in Regina v. O'Brien.[68] He says: "Where an instrument is used, the law appears to be different; there the instrument must be within the premises, not only for the purpose of making an entry, but also for the purpose of effecting the contemplated felony, as where a hook is introduced for the purpose of

[66] 2 East P. C. 499 (Eng.).
[67] Rex v. Bailey, Russ. & R. 341 (Eng.).
[68] 4 Cox C. C. 400 (Eng.).

taking away goods, or a pistol put in for the purpose of killing the inmates of the house, there the entry is sufficient; but if the instrument is merely used for the purpose of making an entry, then the proof of the entry fails."

East says:[69] "If a man shoot without the window, and the bullet comes in, this seems, says Lord Hale, to be no entry to make burglary; though he subjoins a quære. And Hawkins expressly considers the discharge of a loaded gun into a house as an entry. And indeed it seems difficult to make a distinction between this kind of implied entry, and that by means of an instrument introduced within the window or threshold for the purpose of committing a felony; unless it be, that the one instrument by which the entry is effected is holden in the hand, and the other discharged from it. No such distinction, however, is anywhere laid down in terms; nothing further appearing than that the entry must be for the purpose of committing a felony. According to which, where thieves had bored a hole through the door with a centre-bit, and part of the chips were found in the inside of the house, by which it was apparent that the end of the centre-bit had penetrated into the house, yet as the instrument had not been introduced for the purpose of taking the property or committing any other felony, the entry was ruled incomplete."

206. **Time and place of entry.**—Also it appears from cases before mentioned, that if a person, living in a certain part of a mansion, enter into any other

[69] 2 East P. C. 490 (Eng.).

apartment of the same with a felonious intent, that is a sufficient entry. The entry need not be at the same time as the breaking, provided both be in the night; therefore if thieves break a hole in the house one night, with intent to enter another night and commit felony, which they execute accordingly, it is burglary. The entry need not be of the outer door. If the accused enters through the outer door without breaking and, being thus in the house, breaks and enters an inner door, this is a sufficient breaking and entering to constitute these two elements of the crime.[70] And this is true though the accused was lawfully in the house in the first instance. Thus where a servant opened the door of his master's bedroom and entered for the purpose of killing his master, this was held burglary.[71]

207. **The place entered.**—At common law the house entered must be a mansion, or dwelling house. The crime was regarded as an offense against a dwelling, not an offense against property, as property merely. The crime carried with it the idea of danger to the security of the person as well as of damage to the property. Therefore it was not burglary to break and enter a shop; or a manufacturing establishment; or a dairy; or a stable, unconnected with a dwelling. Every house for the dwelling and habitation of man is a dwelling house in which burglary may be committed. So is a chamber or room in which a person dwells, or any other part of a house used for the habitation of man. But

[70] Rex v. Gray, 1 Str. 481 (Eng.).
[71] Edmond's Case, Hutton 20 (Eng.).

the place entered must be a house; entry into a tent, or a booth erected in a fair, though it serve as a lodging, is not burglary.

208. **Same subject—Necessity for occupancy.**—It is not necessary that the house entered be actually, physically occupied, in the sense that a person is present in the house at the time of the entry. A house in which the owner sometimes resides is the subject of burglary, though no one be in it at the time of the entry. Thus in Rex v. Murray,[72] a house in which A dwelt was broken and entered while A was absent on a journey, having been gone a month, no person being then in the house. This was held burglary. To make a dwelling the subject of this crime, however, the house must have acquired the character of a dwelling. If it has never been occupied as a dwelling, there can be no burglary committed in it, even though the owner intends to occupy it the next day.

In Rex v. Harris,[73] A had recently rented a house. He had never slept in it himself, but on the night of the breaking and entering by B, and for six nights previous, two persons were hired by him to sleep in the house to take care of it. It was held that this house was not a dwelling of A so as to make the breaking and entry burglary.

If, however, the owner has once occupied the house as a dwelling, it is the subject of burglary; and he is deemed to have occupied it, in law, if he has occupied it by his servants, as well as in person. Therefore,

[72] 2 East P. C. 496 (Eng.).
[73] 2 Leach C. C. 701 (Eng.).

if his servants have lived in the house that is sufficient occupancy, provided they are still living there at the time of the breaking and entering.[74] Of course it is not necessary that the servants be sleeping in the house on the very night of the breaking.

209. **Same subject—Occupancy abandoned.**—A house though once a dwelling may cease to be so. If so, it is no longer the subject of burglary. Therefore, if a house used as a dwelling be definitely abandoned as such by the occupant, whether abandoned for all purposes, or only as a dwelling, e. g., where a dwelling is turned into a shop, it is no longer the subject of this crime.[75] In the case last cited the prosecutor had formerly lived with his family in the house, but three months before the entry he had rented a house elsewhere and he and his family went to reside there, keeping the house entered as a warehouse and workshop. He employed two women who were employed as workwomen in his business, and not as domestic servants, to sleep in the house to take care of it; they did not take their meals there or use the house for any other purpose than sleeping in it as a security to the house. It was held that this house could not be considered as a dwelling house.

210. **Same subject—Intention to return.**—Merely ceasing to reside in a dwelling does not, however, cause such dwelling to cease being the subject of burglary. If the abandonment is only for a time, and the owner intends to reoccupy it as a dwelling, the

[74] Rex v. Gibbons, Russ. & R. 422 (Eng.).
[75] Rex v. Flannagan, Russ. & R. 187 (Eng.).

house is still the subject of burglary. In Rex v. Murray,[76] A, being possessed of a house in X, in which he dwelt, took a journey into another part of the country. He sent his family out of town, and left the key of the house with a friend to look after the house. After he had been gone a month, no person being in the house, it was broken open in the night, and certain goods stolen. A returned a month later to reside there. This was held to be burglary, as A intended when he left to return and to occupy the house. This case may be contrasted with Rex v. Nutbrown.[77]

In this case John and Miles Nutbrown were indicted for burglary in the dwelling house of one Mr. Fakney at Hackney, and stealing divers goods. The prosecutor made use of the house as a country house in the summer, his chief residence being in London. About the latter end of the summer preceding the breaking, he removed with his whole family to his house in the city, and brought away a considerable part of his goods. And in the November following, the house at Hackney was broken open and in part rifled; upon which he removed the remainder of his household furniture, except a clock and a few old bedsteads and some lumber of little value, leaving no bed or kitchen furniture or anything else for the accommodation of a family. Mr. Fakney, being asked at the time he so disfurnished his house whether he had any intention of returning to reside there, declared that he had not come to any settled

[76] 2 East P. C. 496 (Eng.).
[77] 2 East P. C. 496 (Eng.).

resolution whether to return or not, that he was rather inclined totally to quit the house, and to let it for the remainder of his term. The fact of the burglary happened in January following. The court were of opinion that, the prosecutor having left his house and disfurnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary, it could not be deemed his dwelling house at the time the crime was committed, and accordingly the prisoners were directed to be acquitted of the burglary.

211. **Same subject—Ownership.**—It is not necessary, in order to constitute burglary, that the person occupying the house be the owner. The house may be in the occupancy of the family of the owner, or of his servants. It may be rented or loaned to other persons, and if such other persons are using the house as a dwelling, it is the subject of burglary. Apartments in an apartment house, or rooms in a hotel, are dwelling houses within the law relating to burglary.

212. **Same subject—Double character of occupancy.**—Much difficulty has arisen in the law of burglary in the cases of buildings occupied in part as dwellings and in part for other purposes. A dwelling, as we have seen, is the subject of burglary; a shop is not. What is to be said of a building used in part as a dwelling and in part as a shop? The rule seems to be that in order to constitute the crime of burglary in such a case it is only necessary to show that the house is used habitually as a place to sleep in. If so, the entry is burglary, whether the part

broken and entered be that part used as a dwelling, or only that portion used as a shop. Some of the cases hold that to make the breaking and entry of the portion used as a shop a burglary, there must be some communication between the part used as a shop and that part used as a dwelling. But other cases hold that this is not necessary.[78]

213. **Same subject — Outbuildings.**—It is not necessary to burglary that the house entered be the very dwelling house itself. As said by Blackstone: "The capital house protects and privileges all its branches and appurtenances, if within the curtilage or home-stall."[79] Therefore the breaking and entering, with the requisite intent, of an outhouse which is within the same fence or enclosure with the dwelling is burglary, for such outhouse is considered parcel of the dwelling itself. In Rex v. Clayburn,[80] the place entered was a goose house in the prosecutor's yard, opposite his house. The yard was surrounded partly by other buildings and partly by a wall. It was held that this goose house was part of the dwelling. In People v. Taylor,[81] it was even held that a barn standing eighty feet from the dwelling house, in a yard or lane with which there was a communication from the house by a pair of bars, was within the curtilage, and a part of the dwelling.

If the outhouses are adjoining the dwelling house, and are occupied as parcel thereof, they are consid-

[78] See Quinn v. People, 71 N. Y. 561, LEADING ILLUSTRATIVE CASES.

[79] 4 Blackstone, Commentaries, p. 225; see 1 Hawkins, Pleas of the Crown, p. 163 (Eng.).

[80] Russ. & R. 360 (Eng.).

[81] 2 Mich. 250.

ered as part of the dwelling even though there be no common enclosure or curtilage.

In Rex v. Brown,[82] the prosecutor had a dwelling house in which he lived, a stable, a cottage, a cow house and a barn, all in one range of buildings, and under one roof, but they were not enclosed by any fence, and had no communication from one to the other. The accused broke and entered the barn, and it was held he was rightly convicted of burglary. If, however, the outhouse be not enclosed in a common fence, and be distinctly separated from the house by a public highway, the entering of such outhouse is not burglary, it not being a parcel of the dwelling house.[83]

214. **The intent.**—In order to convict of the crime of burglary it is necessary to prove that the breaking and entering was done with intent to commit a felony. It is not necessary to prove that a felony was actually committed, but only that such felony was intended at the time of the breaking and entering; therefore, if the defendant broke and entered with such intent, he is none the less guilty though he was frightened away or repented before the intended felony was actually committed. The entry need not be with the intent to steal, though this is the crime intended in most cases of burglary—the intent to commit murder, or arson, or rape, or any other felony, either common law or statutory, is sufficient to constitute the crime of burglary.

Concurrence of intent. The intent to commit the felony must exist both at the time of breaking and

[82] 2 East P. C. 493 (Eng.).

[83] Curkendall v. People, 36 Mich. 309.

at the time of entering, or the crime is not committed. If A should break the house of B with intent to commit rape on B but, before actual entry by A, B should consent to the intercourse, the entry by A would not be burglary; or if A should break the house of B for the purpose of killing B and discover, before entry, that B was absent, but nevertheless enter for the purpose of taking revenge on B by breaking his furniture, since the destruction of the furniture would be only a misdemeanor, and not a felony, such breaking and entering would not be burglary. Conversely, if A should break the house of B with no intent to commit a felony, but before entering should conceive the intent to enter and kill B, and should enter for that purpose, such entry would not be burglary.

215. **The time.**—It is necessary, to constitute the crime of burglary, that the breaking and entering be done in the night time. It is not sufficient that the breaking alone or the entry alone be done at night; both the breaking and the entry must be done at night or the crime is not committed. Therefore, if on a given day on which night began at six o'clock, A should, at five minutes before six, break the house of B, and, six minutes after the breaking was complete, enter the house, this would not be burglary. The breaking and entering need not be on the same night, however; the breaking may be on one night and the entry on another night. In Rex v. Smith,[84] the prisoner broke the glass of the prosecutor's door on Friday night with intent to enter at a future time,

[84] Russ. & R. 417 (Eng.).

and actually entered on the Sunday night following. It was held that the prisoner was properly convicted of burglary, as both the breaking and entering were done with intent to commit a felony, and both were done in the night, and the fact that they were done on different nights was immaterial.

When night begins. East says: "As to what shall be accounted night for this purpose, anciently, the day was accounted to begin only from sun-rising and to end immediately upon sun-set; but it is now generally agreed that if there be day-light enough begun or left either by the light of the sun, or twilight, whereby the countenance of a person may be reasonably discerned, it is no burglary; but that this does not extend to moon-light, for then many midnight burglaries would go unpunished. And besides, the malignity of the offense does not so properly arise, as Mr. Justice Blackstone observes, from its being done in the dark, as at the dead of night, when all the creation, except beasts of prey, are at rest, when sleep has disarmed the owner and rendered his castle defenseless."[85] In some jurisdictions the time at which night begins and ends is fixed by statute at a certain definite hour.

Statutory breaking. As we have seen, burglary could be committed at common law only against a dwelling house. By statute, in most, if not all, jurisdictions, breaking and entering of other buildings, such as offices, shops, banks, etc., are now made a substantive crime, and this, whether done in the night time or the day.

[85] 2 East P. C. 509 (Eng.).

CHAPTER XXVII.

ARSON.

216. **Definition — The burning.** — The crime of arson is defined to be "the maliciously and wilfully burning the house, or outhouse, of another man."[86] This crime is a felony at common law. The burning necessary to constitute arson must be an actual ignition of the whole or some part of the house. It is not necessary that any part of the house be entirely consumed, or that the fire should have any continuance. The offense is complete, though the fire is put out, or goes out of itself. In Regina v. Russell,[87] the testimony showed that a small fagot, lighted and burning, had been placed by the prisoner on the boarded floor of the kitchen. A part of the boards of the floor had been scorched black, but not burnt. The fagot was nearly consumed, but no part of the wood of the floor was consumed. The court held that as the wood of the floor was only scorched, and no part of it had been consumed, the offense was not complete. On the other hand, where it appeared that the floor had been scorched and was charred in a trifling way, and had been at a red heat, but not at a blaze, it was held that this was a sufficient burning to constitute the offense.[88]

[86] 4 Blackstone, Commentaries, p. 220.
[87] Car. & Marsh. 541 (Eng.).
[88] Rex v. Parker, 9 Car. & P. 45 (Eng.).

217. The place burned—Ownership and possession.—To constitute arson, the place burnt must be a dwelling, but, analogous to the crime of burglary, the house burnt need not be the very dwelling house itself. The crime extends to all outhouses that are parcel of the dwelling, even if not adjoining thereto, nor under the same roof.

Ownership of the house. The definition of arson requires that the place burnt be the house of *another,* but arson, like larceny, is an offense against possession rather than against ownership. As said by Blackstone:[89] "It is an offense against that right of habitation which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attend it. Therefore, when it is said that to constitute arson the house burnt must be the house of another, it is meant rather that the house must be in the occupancy of another than that it must be in fact owned by another."

On this principle one entitled to dower in a house that is leased to another may be convicted of arson in burning such house during the continuance of the lease and while the house is occupied by the tenant.[90] On the other hand, it is not arson at common law for a tenant in possession of a house belonging to another, to burn such house. Such was the case of Rex v. Breeme.[91] In this case, Breeme set fire to a house which he had leased from the prosecutor, and in which Breeme was living. It was held that

[89] 4 Blackstone, Commentaries, p. 220.
[90] Rex v. Harris, Fost. 113 (Eng.).
[91] 1 Leach 261 (Eng.).

this was not arson. The court said that arson is an offense against the possession, and that, therefore, if a person in possession of a house as tenant, however short his term may be, set fire to it, it is not arson.

218. **Same subject—Custody.**—But the rule, that a person in possession cannot commit arson by burning the house in his possession, only applies to cases of legal possession, not to cases of mere custody. In Rex v. Gowan,[92] it appeared that the house burned by Gowan was rented by A, and leased by him from year to year to B, who paid the rent for it. The prisoner was a servant of B, who was allowed to live in the house without payment of rent. The prisoner was living with his family in the house when he set fire to it. This was held arson, the court saying that the prisoner had no interest in the house, being a mere servant of the tenant; that his possession was the possession of the tenant, and therefore the burning was the burning of the house of another. Though the burning of a house in one's own possession was not arson at common law, yet the burning of such house, if it was so near to other houses as to create danger to them, was a grave misdemeanor.

Burning by husband or wife. The husband and wife were regarded at common law as one, hence a wife could not be convicted of burning a house owned by her husband; nor could the husband be convicted for burning a house which was owned by his wife.

[92] 2 East P. C. 1027 (Eng.).

219. **The intent.**—The intent necessary to constitute arson is expressed in the definition by the words "wilfully and maliciously." The word "wilfully" negatives the idea of mere negligence, therefore it seems that no mere negligent burning can amount to the crime of arson. Nor, it seems, can the intent be a mere constructive intent. Therefore, it is not arson to burn a house unintentionally while in the commission of another felony. As said by Hale:[93] "If A shoot unlawfully, in a hand gun, suppose it to be at the cattle or poultry of B, and the fire thereof sets another's house on fire, this is not felony [arson], for though the act he was doing was unlawful, yet he had no intention to burn the house thereby." Earlier writers thought constructive intent sufficient.

While there must be the specific intent to burn, yet there need not be the specific intent to burn the identical house for the burning of which the accused is indicted. If A have the malicious intent to burn the house of B, and in setting fire to it burn the house of C also, or the house of B escape and the house of C only be burnt, he may be convicted of arson in burning the house of C.[94] If the burning be intentionally done it is immaterial what the motive of the defendant was in causing the burning. Therefore, where the accused burnt a hole in the floor of a jail in order to effect his escape, it was held that he was rightly convicted of arson.[95]

[93] 1 Hale, Pleas of the Crown, p. 569 (Eng.).
[94] 1 Hale, Pleas of the Crown, p. 569 (Eng.).
[95] Luke v. State, 49 Ala. 30.

220. **Other burnings.**—Statutes now exist in most if not all jurisdictions making penal the burning of buildings other than dwellings, varying the degree of the punishment according to the character of the house burnt, and in some cases placing an increased penalty for a burning in the night time over that provided for a burning in the day.

CHAPTER XXVIII.

FORGERY.

221. **Definition.**—Forgery is the fraudulent making or alteration of a writing to the prejudice of another man's right.[96] Other definitions are: A false making (which includes every alteration or addition to a true instrument) *malo animo* (with evil mind) of any written instrument for the purpose of fraud and deceit.[97] Bishop defines this offense as follows: The false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.[98] Forgery was a misdemeanor at common law.

222. **The instrument forged.**—It was very doubtful at common law what writings were the subject of the crime of forgery. All writings of a public nature, such as a parish register, a judicial process, a magistrate's order, etc., were the subjects of forgery. But the crime is not confined to the making or altering of public records. Private writings such as deeds, letters of credit, bills of lading, bills of exchange, promissory notes, bonds, transfers of stock, and many similar instruments may be the subject of the crime of forgery. Bishop says the crime is not

[96] 4 Blackstone, Commentaries, p. 247.
[97] 2 East P. C. 852 (Eng.).
[98] 2 Bishop, Criminal Law, § 523.

confined to the falsification of mere writings, it extends also to seals, stamps, and all other visible marks of distinction by which the truth of any fact is authenticated, or the quality or genuineness of any article is warranted; and, consequently, where a person may be deceived and defrauded from having been by false signs induced to give credit where none was due.[99]

223. **Same subject—Efficacy of the instrument.** —Not every written instrument is, however, the subject of forgery. Forgery presupposes the possibility of a genuine instrument, and that the false instrument is not as good as the genuine instrument, and that the one is not as efficacious for all purposes as the other. That such must be the character of the instrument is shown by the case of Regina v. Smith.[1] In that case Smith was indicted for forging certain documents. It appeared that the prosecutor, George Borwick, was in the business of selling a certain powder called Borwick's Baking Powder. This powder was sold in packets, being wrapped up in printed papers which contained the name of George Borwick, but so wrapped that the name was not visible till the packets were opened. The prisoner, who also sold baking powder, prepared and printed a number of labels as nearly as possible like those used by Borwick, except that the name of Borwick was omitted. The prisoner then wrapped his powder in these labels and sold the powder as Borwick's powder.

[99] 2 Bishop, Criminal Law, § 529.
[1] 8 Cox C. C. 32 (Eng.).

The court held this not to be forgery. Bramwell, B., said: "I think that this was not a forgery, even assuming that the definition of forgery at common law is large enough to comprehend this case. Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other. In the present case one of these documents is as good as the other—the one asserts what the other does—the one is as true as the other, but the one is improperly used. But, the question now is, whether the document itself is a false document. It is said that the one is so like one used by somebody else that it may mislead. That is not material, or whether one is a little more true or more false than the other. I cannot see any false character in the document. The prisoner may have committed a gross fraud in using the wrappers for that which was not the genuine powder, and may possibly be indicted for obtaining money by false pretenses, but I think he cannot be convicted of forgery."

224. **Same subject—Real and apparent inefficacy.**—Since the instrument must have at least an apparent legal efficacy, the making of an instrument void on its face is not forgery; thus, it has been held that the false making of a will signed by a less number of witnesses than is required by law for a valid will, is not forgery.[2] So the false making of a bill of exchange drawn for more than 20s and less than £5, without mentioning the address of the

[2] Rex v. Wall, 2 East P. C. 953 (Eng.)

payee, and having a subscribing witness, was held to be not a forgery, such bill being declared void by statute in the jurisdiction.[3] But, while there can be no forgery of an instrument absolutely void on its face, it is not essential to a conviction of this crime that the instrument forged have any real validity.

Thus, in Rex v. Deakins,[4] it was held to be forgery to write a protection as in the name of a person being a member of parliament, though such person was at the time not a member of parliament, and therefore the protection had no real validity. It is on this principle that the signing of a fictitious name to an instrument, or the name of a person who is deceased, is a forgery. Such an instrument has, of course, no legal validity, for it binds nobody; yet since it does not appear on its face to be invalid, and since it has a tendency to deceive a person unaware of the true facts, it is forgery.

225. **Same subject—The resemblance.**—In order to constitute forgery the false instrument must bear some resemblance to the instrument it purports to be. How close the resemblance must be depends on the particular case. It has been said that the resemblance must be such as would deceive persons of ordinary caution. Under this statement of the rule it has been held that one may be convicted of forgery in writing the following paper: "Mr. R. T. Long, please let Henry Carmone have 500 dollars,

[3] Rex v. Moffatt, 2 East P. C. 954 (Eng.).
[4] 2 East P. C. 653 (Eng.).

and I will be in Monday and pay you, oblige [signed] J. M. Hawood." The person to whom this order was addressed testified that he knew one J. M. Haywood; that writings had passed between them; that his name was spelt with a "y" as well as a "w"; that he did not notice the order particularly; that he thought the name was spelt Haywood. In affirming a conviction, the court said: "It is true, as contended by the appellant's counsel, that the order must have resembled a genuine one, and been such as might have deceived or misled a reasonable person; but this does not imply that it must have been perfect and orderly in form, and correctly spelled the names of the persons mentioned in it. A genuine order might be informal or slightly incomplete—some of the words misspelled—a firm addressed not precisely by its name—the maker might, in his haste, or by inadvertence, omit a letter from his name—some or all of these imperfections might appear upon careful examination, and yet a reasonably cautious business man might—would—frequently accept such order, attributing the irregularities to haste and inadvertence, in some respects perhaps to lack of accurate information. Orders for goods and the like are often drawn hastily, carelessly. Many business men pay little attention to spelling or forms and, moreover, haste in the course of business will not allow of strict scrutiny of orders presented to be acted upon promptly. If, therefore, the false and fraudulent paper writing be such as that it might, from its nature, and the course of business, deceive or mislead to the prejudice of

another person, the offense of forgery would be complete."[5]

226. **The act necessary.**—Forgery is the false making or alteration of a written instrument. To constitute the crime there must be a making or altering of a writing. Not every trick or false pretense or fraudulent act consummated by means of a written instrument is a forgery. Forgery is the false making, not the false using. Therefore, it is not forgery to procure an illiterate person to sign a note for $141 by falsely pretending that it is for $41 only;[6] nor is it forgery to procure a person to make a promissory note by falsely representing that a previously made note was lost, and then passing the new note as the original.[7] As said by the court in the case last cited: "The defendant was guilty of the fraud, but not of the making. The paper was made by the other person himself, in prejudice of his own right. To complete the offense, according to the definition, it requires a fraudulent intent and making, both. The latter is innocent without the former, and the former, if carried into effect without the latter, is merely a cheat. If every trick or false pretense or fraudulent act by which a person is induced to put his name to a paper which he would not otherwise have signed is to be called a forgery, where shall we stop, and what shall be the rule? Is it forgery to take a note for a debt known not to be due?

[5] State v. Covington, 94 N. C. 913.
[6] Commonwealth v. Sankey, 22 Pa. 390.
[7] People v. Pfeiffer, 243 Ill. 200.

Or to procure a deed for valuable land by fraudulently representing to the ignorant owner that it is worthless? Or to get a legacy inserted in a will by imposing on a weak man in his illness? All these would be frauds—frauds perpetrated for the purpose of getting papers signed—as much as that which was committed in this case; but no one thinks they are forgeries."

227. **Same subject—Alteration of instrument.**—It is not necessary, to constitute forgery, that the entire instrument be written by the defendant. The fraudulent alteration of an instrument already written is sufficient, for the alteration is the making of a false instrument out of a true one. Thus, the fraudulent insertion of a provision for a legacy in a will is forgery.[8] Likewise, the fraudulent alteration of something already written, as the changing of the date of a bill of exchange after acceptance, or the alteration of the figures in such bill so as to make £10 read £50, is forgery. The alteration of a written instrument by erasing some material portion of it is forgery; as where the endorsement on a bank note was erased.[9] While the insertion of matter in a written instrument may be forgery, it is said that the mere omission to insert something, though done wilfully and with intent to defraud, is not forgery; e. g., omitting to insert a legacy in a will which one is directed to draw for another.

Alteration must be material. To constitute forgery by alteration of an instrument, the alteration

[8] 2 East P. C. 856 (Eng.).
[9] 2 East P. C. 855 (Eng.).

must be material. In State v. Gherkin,[10] G was indicted for forging the name of a witness to a bond. The bond did not require the signature of a witness for validity. The court said this was not an alteration in a material part of a true document by which the obligee was or could be defrauded, hence it was not forgery.

228. **Same subject—False signing.**—Forgery may be committed by the false signing of an instrument as well as by the false making or alteration of an instrument. Thus, to sign the name of a person to a bond, note, bill, or other instrument with intent to defraud, is forgery.

Signing fictitious name. The name signed need not be the name of an existing person. Signing a fictitious name is sufficient. In Rex v. Taft,[11] Taft stole a bill of exchange, and took it to a banker. The banker refused to pay it until it was endorsed by the person presenting it. Taft then endorsed it with the fictitious name of "John Williams," and obtained payment. This was held to be a forgery, though the fictitious signature added nothing to the validity of the bill and though the intent of the defendant was only to conceal himself.

Forgery in signing one's own name. Forgery may be committed even by signing one's own name to an instrument. Thus, if a check or bill of exchange, payable to "John Smith" or order, get into the hands of another person of the same name, and such person, knowing that he is not the real payee

[10] 29 N. C. 206.
[11] 1 Leach C. C. 172 (Eng.).

in whose favor it is drawn, endorse it with his own name, "John Smith," he is guilty of forgery. Likewise, if John Smith make a note and sign it with his own name, but with the intent of passing it as the note of another John Smith, this is forgery. But merely passing one's self off as the person whose true name appears on an instrument is not forgery, for there is no false making, which is necessary to constitute forgery.

229. **Same subject—Signing as agent.**—Since, to constitute forgery, the instrument must be false, signing the name of another under an assumed, but false assumption of authority to sign, though done for the purpose of defrauding, is not forgery. In State v. Taylor,[12] the defendant signed the name of a number of persons to a promissory note. He then wrote an addendum, reading, "I was authorized to sign the above names." He was not, in fact, so authorized. On an indictment for forgery, it was held that the crime was not committed. The court said: "Forgery is defined as the making or altering of a writing so as to make the alteration purport to be the act of another person. This definition does not embrace the making of a note per procuration of the party whom he intends to represent. The false assumption of authority is not the forgery denounced by the statute, and by falsely assuming to act as agent the maker of the instrument does not make the alteration purport to be the act of another. It is his own unauthorized and wrongful act, and not the fraudulent falsifying of another's name, as

[12] 46 La. Ann. 1332.

in forgery. It was not a false making of another's signature. It did not purport to be the signatures of the drawers personally, but their signatures as written by the defendant acting as an agent. He did not personate others and fraudulently write their names, but stated on the face of the instrument that he was an authorized agent. This did not constitute forgery, though he may have had no authority in fact. The agency expressed takes the instrument out of the category of false making in the sense of forgery. There was no attempt made to imitate the signatures of the drawers, or to impose by attempting to create the impression that they had signed. To constitute the offense there must be some attempt made to imitate a genuine instrument and the writing falsely made must purport to be the writing of another."

230. **The intent.**—It is an essential element of the crime of forgery that the act be done with intent to defraud. Actual loss resulting from the act is not essential, but an intent to defraud is. Therefore, if the act of signing another's name to an instrument, or altering such instrument, was done by the accused under a bona fide (honest) belief that he had authority so to do, he cannot be convicted of forgery. It has been held, however, that if a person, relying on the kindness of another (a near relative, for instance), sign the other's name to a bill without authority, trusting that he will pay it and that, therefore, the person to whom it is passed will not lose anything, this is forgery; also, that if a person, wishing to raise money, put the name of

another on a bill without authority, intending to pay the bill himself when due, this is a forgery though he believes that he will be able to pay it when the time arrives.[13] According to the better opinion, while there must be an intent to defraud, the intent need not be to defraud a particular person, A or B. If the defendant know that his act must cause loss to some one, it is sufficient. But he must do an act the effect of which will be to cause loss to some one if the instrument is put into circulation.

231. **Uttering a forged instrument.**—Connected with the crime of forgery is the crime of uttering a forged instrument. This is a substantive offense at common law, and is a misdemeanor. The act of uttering is the offering, whether accepted or not, of the forged instrument, with a representation, by words or actions, that the same is genuine.[14]

To constitute the crime of uttering a forged instrument, it must be shown that it was forged, that the person uttering it knew it to be forged, and that it was uttered with intent to defraud.

[13] Regina v. Beard, 8 Car. & P. 143 (Eng.).
[14] Black, Law Dictionary (2nd ed.), p. 193.

CHAPTER XXIX.

LIBEL.

232. **Elements of the crime.**—A libel is any representation in writing, or by pictures, effigies, or the like, calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable.[15] Libel is a misdemeanor at common law. It is also a tort for which damages may be recovered in a civil action. The libellous representation may be made by a writing, a picture, a sign, a painting, or the like. It may be contained in a song, a book, a newspaper, a letter, a cartoon. Even fixing up a gallows against a person's door, is a libel.[16] But mere spoken words of defamation were not indictable at common law, though they have been made so by statute in some jurisdictions.

233. **Persons on whom libel may be made.**—A libel may be made against any person, living or dead. The gist of the offense is the tendency it has to cause a breach of the peace. If it is made on a living person the tendency is to tempt him to a breach of the peace, if made against a dead person it offers the same temptation to the living relatives.

On a public officer. A libel may be made on a person in his official capacity by simply imputing to

[15] 2 Bishop, Criminal Law, § 907.

[16] 1 Hawkins, Pleas of the Crown, p. 542 (Eng.).

him improper acts or motives. In Rex v. Brigstock,[17] B, the publisher of a newspaper, after giving an account of an affray, stated that the magistrates had neglected their duty in refusing, when called upon, to preserve the peace. This was held to be a libel. It has also been held to be a libel to publish of a juror that he had agreed with other jurors to assess damages by playing a game of draughts.[18]

On an individual. As there may be a libel on a person in his official capacity, so there may be a libel on one as a private citizen, by any writing tending to blacken his reputation or to expose him to public hatred, contempt, or ridicule. Thus, it is a libel to print of one that he has been a convict; that he cheated at an election; that he grossly insulted a woman; that he was guilty of immoral conduct. It is not necessary, however, to constitute a libel, that the writing impute crime or immorality. As said by Starkie: "As every person desires to appear agreeable in life, and must be highly provoked by ridiculous representations of him tending to lessen him in the esteem of the world, and by the sure effect of ridicule to cast a shade upon his talents and virtues," any charge that sets "him in a scurrilous or ignominious light is a libel. Therefore, all such written abuse as may be fairly calculated to impair him in the enjoyment of society, hold him up to scorn and ridicule, or throw a contempt on him which might affect his general fortune

[17] 6 Car. & P. 184 (Eng.).
[18] Commonwealth v. Wright, 1 Cush. 46 (Mass.).

and comfort" is a libel.[19] Thus, it may be libellous to burn a person in effigy; to state that he is in financial difficulties; that he is not a proper person to be received in society; that he is a "black sheep" or a "blackleg," and the like.[20]

On several persons. A libel, to be such, need not be directed against a single individual. It may be directed against several persons singly or corporately. Thus, to accuse an insurance company of fraudulent practices is libellous;[21] and one publishing a charge of immorality against a religious society of females is guilty of libel.[22]

234. **Publication.**—To make the crime of libel complete it is necessary that the defamatory matter be not only written, but published. "Publication," in the law of libel, means the act of making the defamatory matter known, of disseminating it or communicating it to one or more persons.[23] It is held in some cases that publication to the prosecutor alone is sufficient to support a prosecution for libel. This would seem to be correct, since the gist of the offense is its tendency to a breach of the peace. It is held in some jurisdictions, however, that for the publication to be complete, the libel must be exhibited to a third person.

It is not essential to a complete publication that any person actually read the libellous matter, it is sufficient if it be exhibited in such a manner that

[19] Starkie, Slander and Libel, p. 177.
[20] Ibid., pp. 174-175.
[21] Williams v. Beaumont, 10 Bing. 260 (Eng.).
[22] Reg. v. Gathercole, 2 Lew. C. C. 237 (Eng.).
[23] See Black, Law Dictionary (2nd ed.), p. 965.

persons could so read it. In Giles v. State,[24] the defendant fastened the libellous matter on a tree, in a public place. It was objected by the defendant that it was not charged in the indictment that any one had read the libel. The court said: "Actual communication of the contents of a libel, as by singing or reading, is one mode of publication; but it is neither the only nor the usual mode. The common method is by posting up of the paper, written or printed, or its delivery, and no question is ever asked as to whether it was read or not. We say of an author that he has published a book, when he has given its contents to the world; and we speak of the publication of a will, without meaning to denote that the contents of the instrument have been actually communicated. So it is with a libel. Publication, says Best, J., in The King v. Sir Francis Burdett, is nothing more than doing the last act for the accomplishment of the mischief intended by it.

"The moment a man delivers a libel from his hands his control over it is gone; he has shot his arrow and it does not depend upon him whether it hits the mark or not. There is an end of the *locus pœnitentiæ* [place for repentance]—his offense is complete—all that depends upon him is consummated; and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act. So, then, the mere delivering over, or parting with the libel, is a publication. There need be no averment or proof of the actual communication of the contents of the paper. Lord Coke says:

[24] 6 Ga. 276.

A libel may be published traditione, by delivery, 5 Reports, 126, a; and this definition is adopted by Chief Baron Comyns, in his Digest, title, Publication, b. 1. If a letter containing a libel is sent, sealed, to another, or to the party himself against whom it is made, or is addressed through the post office, it is a sufficient publication. 1 Saund. Rep. 132, notes. If these propositions be tenable, and I doubt not they are law, then the case before us is free from doubt."

235. **Privileged communications.**—It is not every publication of matter reflecting on another, or holding such other up to public ridicule, that is punishable. The public has the right, in certain cases, to be informed of the character of certain persons. In such cases the public right is greater than the right of the individual to immunity from harmful statements, and therefore if the statements are made in good faith, and believed to be true by the person making them, the statements are not indictable.

Judicial proceedings. It is of great importance that persons engaged in the administration of the law, and litigants seeking redress in the courts, should be free from the fear of criminal prosecution for written statements made by them in the course of a trial. Therefore, judges, juries, witnesses, litigants, and counsel are not liable in a prosecution for libel in regard to such statements made in the course of a trial.[25] Reports published of the proceedings in a court are likewise privileged, and not indictable if the reports are fair and impartial, and the

[25] See Starkie, Slander and Libel, chap. 8.

subject matter thereof is not such as is offensive to the public and injurious to society. As has been said, the report, to be privileged, must be fair and impartial. In considering whether the report is fair it should be considered as a whole. It may be unfair because of untrue statements or inferences, or because it gives only a partial report of what took place.

Legislative proceedings. As in the case of judicial proceedings, so in the case of legislative proceedings, there is an absolute privilege as to statements made within the legislative halls in the ordinary course of debate. But a publication outside, of a speech made within the legislative halls, is not privileged; and if it contains libellous matter, it is indictable. Publications of the reports of the proceedings of legislative bodies are privileged in a similar manner to reports of judicial proceedings —they must be proper as to subject matter, and related in a fair and impartial manner.

Matters of public interest. There are other matters than those already mentioned where public policy demands a certain freedom of statement even though an individual may be injured thereby. These matters are generally described as matters of public interest. Such are the acts of public men, ministers, generals, judges, etc., books and other literary productions, public theatrical performances, and all other matters that concern the public generally. Statements made in relation to these persons or things are not libellous if they are true; or even though false, if they express the real belief

of the writer, provided such belief has been formed with a reasonable degree of care and on reasonable grounds.[26]

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[26] Clark and Marshall, Law of Crimes, p. 1021.

LAW OF CRIMINAL PROCEDURE

BY

WILLIAM L. BURDICK, A.M., Ph.D., LL.B.*

INTRODUCTION.

1. **Criminal procedure—Meaning of.**—Procedure, as a general term, means the act or manner of proceeding or moving forward, the steps taken in the progress of any matter. In connection with the prosecution of crimes, the word includes pleading, process, evidence, and practice; in fact, every step that may be taken from the beginning to the end of a case.[1] The word "trial" is not the equivalent of the word "procedure." It is less comprehensive. "Trial" does not include, for example, the acts by which a defendant is brought into court and by which the issues of law and fact are presented, but relates solely to the examination before the tribunal of the facts or the law put in issue and the determination thereof.

Procedure is designated as either civil or criminal. In fact, the word "criminal" is used merely

* Professor of Law, University of Kansas. Author: "Elements of Sales," "New Trials and Appeals." Editor: "Cases on Sales." Contributor to legal journals and encyclopedias.

[1] City of Kirksville v. Munyon, 114 Mo. App. 567, 91 S. W. 57.

as the opposite of "civil." Civil procedure embraces all matters for individual redress. It has been defined as "the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right."[2] In a civil proceeding the plaintiff seeks the recovery of money or other property, or the enforcement of a personal right. The object of a criminal proceeding, on the other hand, is the punishment of a public offense, and the prevention, thereby, of similar offenses. A criminal prosecution, although instituted by an individual, is not, however, in any sense an action between such person and the accused.[3] It is a prosecution carried on in the name of the state for any crime against society.[4] A criminal prosecution, moreover, does not involve property rights. The issue is between the state and the accused on a question of the latter's guilt or innocence. A crime is a public wrong, and the sovereign authority, either the king, the nation, or the state, prosecutes the offender as one who has violated its peace and dignity. In England it is the crown who prosecutes, the nominal complainant being the king (Rex, or R.). For this reason, criminal prosecutions, in that country, are called crown cases, or pleas of the crown, in distinction from "common pleas" which pertain to civil, or private suits. In this country, the United States, or a particular state, is the prosecutor, or plaintiff, according as the offense is one against the federal gov-

[2] Cancemi v. People, 18 N. Y. 128, 136.
[3] Harger v. Thomas, 44 Pa. 128, 84 Am. Dec. 422.
[4] Ely v. Thompson, 10 Ky. 70, 74.

ernment or an individual state. In some states, the nominal prosecutor is "The People" and in a few others, "The Commonwealth."

2. **Sources of our law.**—The sources of our law relating to criminal procedure are both unwritten and written. In England, the rules regulating the steps to be taken in the prosecution of criminal causes grew up in the common law courts, particularly in the court of King's Bench, on its Crown side, which had general jurisdiction of public offenses.[5] In time, a body of rules, resulting either from general rules of court or from decisions in actual cases, was developed. This was the unwritten law. From time to time, however, these rules were modified, amended, or added to by various statutes. The result was a system of procedure composed partly of common law and partly of statutory elements. The early settlers in this country brought with them the English system of criminal procedure. This became in consequence our common law. This, in the course of time, has been more or less changed by statutes in all our states, but the basic principles of the common law still remain as the foundation of our criminal procedure. In a few states where the statutes very fully regulate the procedure, it is customary to speak of such collected statutes as a "code" and to describe, in order to distinguish between the written and the unwritten law, the mode of procedure as "code procedure." In all such states, however, it is frequently necessary to invoke

[5] At the present time, in England, the King's Bench Division of the High Court of Justice is the principal court of criminal jurisdiction.

the common law for the purpose of definition and explanation.

In the federal courts, moreover, the common law practice in criminal actions prevails, except so far as the same has been changed by the Federal Constitution or statutes.[6] Congress has never enacted a code of criminal procedure, and the states have no power to prescribe either modes of procedure or rules of evidence in prosecution for federal offenses. In a general way the federal courts must be governed in these respects by the common law.

[6] U. S. v. Reid, 12 How. 361 (U. S.); Erwin v. U. S., 37 Fed. 470, 488; U. S. v. Nye, 4 Fed. 888.

CHAPTER I.

JURISDICTION AND VENUE.

3. **Jurisdiction—In general.**—By jurisdiction is meant the legal power or authority to hear and determine a cause, whether in civil or criminal matters. If the court which assumes the preliminary examination or the trial of a person accused of crime has not jurisdiction both of the subject matter and of the person, its proceedings and its judgment thereon are null and void. In order to determine the jurisdiction in any particular offense, resort must be had to the constitutional and statutory provisions of the state, or, in the absence of such express laws, to the principles of the common law. A statute may confer jurisdiction although no such jurisdiction exists at common law, as, for example, providing that one may be tried for murder in a state from which a fatal shot was fired,[7] or poison sent, although the injury was inflicted and the resulting death occurred in another state; or where the death takes place within the state although the mortal blow was given, or the poison administered, without the state.[8]

Where, however, the Constitution expressly limits or prescribes the jurisdiction of offenses, a statute cannot enlarge such jurisdiction or take away from

[7] State v. Hall, 114 N. C. 909, LEADING ILLUSTRATIVE CASES.
[8] Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 436.

the courts the power thus given them.[9] In absence, however, of constitutional restriction the legislature may confer concurrent jurisdiction of offenses upon separate courts, and in case two different courts within a state have concurrent jurisdiction, the court which first acquires jurisdiction retains it until the final determination.[10]

4. **Place of the offense.**—It is a fundamental principle that one state will not and cannot assume jurisdiction of offenses committed against the laws of another state.[11] One, however, who without the state commits a crime within the state by the hand of an innocent agent, can be prosecuted for the offense in the state where the act is committed, provided the state can obtain jurisdiction of his person. Yet, that an accessory before the fact, who outside the state procures an accomplice to commit a crime in another state, can be tried in the latter state, has been both denied[12] and affirmed.[13] The jurisdiction of a state extends to all lands and waters within its territorial limits. Where a river or some other body of water forms the boundary, the jurisdiction of the riparian states is fixed either by compact between such states, especially in case of the older states, or by the federal enabling act which created these states. Over the Hudson river, for example, between the states of New York and New Jersey, the state of New York has exclusive jurisdic-

[9] Wilson v. People, 94 Ill. 426.
[10] State v. Chinault, 55 Kan. 326, 40 Pac. 662.
[11] State v. Hall, 114 N. C. 909, LEADING ILLUSTRATIVE CASES.
[12] State v. Wyckoff, 31 N. J. L. 65.
[13] State v. Grady, 34 Conn. 118.

tion.[14] Over the Mississippi river between Minnesota and Wisconsin each state has concurrent jurisdiction,[15] as is also the case with reference to the Missouri river between Missouri and Kansas.

With reference to certain particular offenses, the place of the offense is governed by special rules. Thus, in felonious homicide, the crime is committed in the state where the injury is inflicted and not (unless so provided by statute) in the place where the victim dies. It was held otherwise, however, in some of the old cases, since it was argued that the death must occur within a state in order to give it jurisdiction.[16]

The locus of the crime of larceny is in the state where the property is taken, but when property stolen in one state is carried into another state, the accused may, according to the law in many states, be prosecuted for the larceny in the state into which the property is carried. This doctrine is derived from the rule that one who steals goods in one county of a state and carries them into another county of the same state, may be tried in either of these counties. Some states have refused, in absence of a statute, to extend this rule of different counties to different states.

5. **Jurisdiction of the person.**—The criminal laws of a state apply, as a rule, to all persons within its territorial jurisdiction. The citizens of other states and aliens are equally amenable to criminal punish-

[14] State v. Babcock, 30 N. J. L. 29; People v. Central R. Co., 42 N. Y. 283.
[15] State v. George, 60 Minn. 503, 63 N. W. 100.
[16] Com. v. Linton, 2 Va. Cas. 205.

ment.[17] Friendly sovereigns, however, also their ambassadors, public ministers and attendants, are, while sojourning within the territorial limits of another sovereignty, exempt from its laws. This is a principle of international law observed by all civilized nations.[18] Ships of war which belong to a friendly power are, likewise, when within the harbors of a foreign country, exempt from its penal jurisdiction.

That a person who committed a crime in a certain state, and who departed from its jurisdiction, is brought back into the state by an illegal arrest, or other unlawful or fraudulent means, is no ground upon which the jurisdiction of his person can be questioned.[19]

6. **What courts have jurisdiction—In general.**—When one has been arrested for an alleged offense, it is often a matter of importance to determine what court has jurisdiction of the case. This question can usually be answered by reference to the Constitution and statutes, generally the statutes of the state in which the offense is committed. The offense, however, may be a violation of the laws of the United States, and the federal courts may alone have jurisdiction. Again, in some instances the same offense may be a crime under both the state law and the federal law, in which case both the federal courts and the state courts have concurrent jurisdiction.[20]

[17] McDonald v. State, 80 Wis. 407, 50 N. W. 185.

[18] Wheaton, International Law, §§ 97-105; U. S. Rev. Stats., §§ 4062-4066.

[19] Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225.

[20] U. S. v. Wells, Fed. Cas. No. 16,665; State v. Coss, 12 Wash. 673, 42 Pac. 127.

Where the offense is solely against the state law, the courts of the state in which the act is committed have exclusive jurisdiction.[21]

7. **Same subject—State courts.**—In most states, the courts of original criminal jurisdiction are inferior courts presided over by justices of the peace, having a jurisdiction limited to misdemeanors, and superior courts, variously known in different states as superior courts, courts of common pleas, district courts, circuit courts, or courts of general or special sessions, having a general criminal jurisdiction. In some states, the inferior and superior courts have concurrent jurisdiction over misdemeanors, while in other states the jurisdiction of the inferior courts is exclusive in the trial of petty offenses. At times, the inferior courts are known as county courts or city courts, depending upon the local statutes, and even a probate court may have criminal jurisdiction.[22] The power of inferior courts to hear and determine causes is wholly of statutory origin, and the statutes of each particular state must be consulted in order to ascertain the local jurisdiction. In addition to their jurisdiction over misdemeanors, inferior courts conduct a preliminary examination of persons accused of felonies, and determine whether or not they shall be held for trial by the superior courts.

Offenses against the ordinances of a city are not usually within the jurisdiction of the state courts, but fall within the authority of the city courts, gen-

[21] U. S. v. Stahl, Fed. Cas. No. 16,373.

[22] So in Oklahoma.

erally known as police courts, or municipal courts created by the statutes of the state. The same act, however, may constitute a violation of a city ordinance and at the same time be a violation of the state law.[23]

8. **Same subject—Federal courts.**—Within the jurisdiction of the federal courts, as provided by the United States Constitution, fall all cases relating to piracies and felonies committed on the high seas;[24] all cases arising in buildings and places under the exclusive jurisdiction of Congress and all cases arising within the District of Columbia, and in the territories.[25] There are, however, no common law offenses against the United States, all federal crimes being statutory.[26] Moreover, the courts of the United States have only such criminal jurisdiction as is conferred upon them by the federal statutes. Congress has given, however, to the district courts of the United States general jurisdiction over all acts which are made crimes under the federal statutes.[27]

The territorial limits of the United States as bounded by the territory of foreign nations are fixed by treaty. When rivers or lakes form a part of such boundary, the dividing line is generally through their center. The ocean boundaries are determined by the rules of international law. The high seas are recog-

[23] Fant v. People, 45 Ill. 259.
[24] U. S. Const., Art. I, § 8; St. Clair v. U. S., 154 U. S. 134.
[25] Art. IV, § 3.
[26] U. S. v. Hudson, 7 Cranch 32 (U. S.).
[27] U. S. v. Reid, 12 How. 361 (U. S.). By the Federal Judiciary Act of 1912, the circuit courts were abolished.

nized as the common boundary of all nations, and the ocean boundary of a sovereign nation, within which it has exclusive jurisdiction, is a cannon-shot distance from the shore. When this rule was established the distance was estimated at a marine league, about three and a half miles, and modern advancements in gunnery have not changed the rule. Gulfs and bays having a narrow inlet are regarded as within the jurisdiction of the nation owning the shores, all the waters within the headlands being deemed a part of the nation's territory.[28]

A public or private ship on the high seas is a part of the nation whose flag it lawfully flies, and an offense committed on board the same is an offense against the nation.

9. **No jurisdiction by consent.**—With reference to all courts, whether federal, state, or municipal, where there is no jurisdiction under the law, the consent of an accused person to the jurisdiction confers no authority upon the court to determine the cause. Jurisdiction is not a matter of consent.[29]

10. **Venue—In general.**—The word venue is derived from the Latin *venire*, meaning to come, and signifies the place from which the jury comes, or, in other words, in a criminal action, the place where the crime was committed, and where the trial is to be held. It is an ancient principle of our common law that an accused person must be tried by a jury of the county where the crime was committed. In the state courts, therefore, venue becomes synony-

[28] Kent, Commentaries, pp. 28-31; Bishop, Criminal Law (6th ed.), §§ 102-105.

[29] People v. Granice, 50 Cal. 447.

mous with county. In the federal courts, it means the same thing as district, or the division of a district. The Constitution of the United States provides that in criminal trials, in the federal courts, the accused shall have the right to a trial by jury "of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[30] Likewise, the constitutions, or the statutes, of the various states generally preserve the common law right of a trial in the county where the crime shall have been committed.[31]

The question of venue is an important one in criminal procedure, since the venue, or the place of the crime, must be alleged in the indictment, and the evidence must show that the venue is correctly laid. Want of any venue is ground for demurrer, abatement, or arrest of judgment.

11. **Particular offenses.**—By a long line of judicial decisions and also by force of various statutes, many principles relating to the venue of particular offenses, under particular circumstances, have become generally established. In any case of doubt, however, the local statutes and decisions should be consulted, since a rule, although generally followed, may not be the law in a particular state. The more important of the general rules will be noted here.

Offenses are sometimes begun in one county and completed in another. For example, a murderous blow may be given in one county, and the death may

[30] Art. III, § 2; Amend. VI.

[31] Hewitt v. State, 43 Fla. 194, 30 So. 795, LEADING ILLUSTRATIVE CASES.

occur in another. The general rule in such cases is that the venue is in either county.[32] Likewise, where offenses are committed near the boundary line between counties, the venue may usually be laid in either.[33] Larceny, moreover, may, as a rule, be prosecuted in any county into or through which the stolen goods are carried. A statute, however, authorizing a prosecution for burglary in a county into which the goods stolen by the burglar were taken, such county not being the county in which the burglary was committed, has been declared unconstitutional.[34]

The venue in the crime of embezzlement is generally the county in which the property is converted,[35] although in some states, by statute, the venue may be laid in any county into which the embezzled property is carried.

For obtaining property by false pretenses, the general rule is that the place of trial is the county in which the property is obtained.

In order to settle the difficulty which may arise in determining the venue when a crime is committed upon a railway train, or other public conveyance, passing through different counties, it is provided by statute, in some states, that the accused may be tried in any county through or into which the vehicle passes.[36]

12. **Change of venue.**—It is generally provided

[32] State v. Jones, 38 La. Ann. 792; State v. Pauley, 12 Wis. 537.
[33] Bayliss v. People, 46 Mich. 221, 9 N. W. 257.
[34] State v. McGraw, 87 Mo. 161.
[35] Spalding v. People, 172 Ill. 40, 49 N. E. 993.
[36] Watt v. People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403.

by statute that, in the discretion of the court, the place of trial may be changed, upon the proper application of the accused, from the regular place of trial to some other county. This is called change of venue. In most states, a change of venue can be made only upon the request of the defendant, although, in some jurisdictions, such a change may be also made upon the application of the state.[37] The statutes also generally set forth the grounds upon which a change of venue may be had, the usual causes for such an order being local prejudice preventing the accused from obtaining a fair trial, and in some states the bias or prejudice of the judge.

An application for a change of venue should be made before the beginning of the trial, that is, before the jury is sworn.[38] The usual procedure is by an application to the court, supported by affidavits to the effect that the statutory grounds exist for making the change. Due notice of the proposed application should be given to the prosecuting attorney, and the state may refute the affidavits filed by the defense by counter affidavits. The determination of the question rests in the sound discretion of the court, and its decision will not be changed upon appeal unless there has been a clear abuse of such discretion. In a clear case the court may order a change of venue upon its own motion.[39]

[37] Hewitt v. State, 43 Fla. 194, 30 So. 795, LEADING ILLUSTRATIVE CASES.
[38] Hunnel v. State, 86 Ind. 431.
[39] Campbell v. State, 35 Tex. Cr. R. 160, 32 S. W. 774. And see Hewitt v. State, 43 Fla. 194, 30 So. 795, LEADING ILLUSTRATIVE CASES.

CHAPTER II.

PRELIMINARY PROCEEDINGS.

13. **In general.**—Before the trial of a person charged with crime there are certain preliminary steps that must be taken in any system of orderly procedure. He must be brought, by arrest or otherwise, before some court having jurisdiction either to try him forthwith, or to determine whether or not he shall be held for trial by some superior court. In some cases, an accused person may be beyond the jurisdiction of the state, and it may be necessary to secure his extradition from some other state or from some foreign country. It is the purpose of this chapter to discuss these questions, leaving certain other matters, also preliminary to the trial, such as the arraignment of the prisoner, and the various motions and pleas he may interpose, to a subsequent consideration.

14. **Modes of prosecution.**—There are four different ways, or modes, of prosecution by which a formal accusation of crime may be lodged against a person. They are complaint, information, indictment, and presentment. A complaint is the least formal of these modes. It may be filed by any person competent to be a witness.[40] It is generally required to be in writing and sworn to. It should distinctly charge

[40] Taulman v. State, 37 Ind. 353.

an offense, although, as a rule, it need not be drawn with the same care and observance of the rules of pleading as is required in informations and indictments. It is the mode of accusation generally used in trials before justices of the peace and police judges. In some states, however, an information may be required even in courts of such inferior jurisdiction, or the warrant of arrest may serve as the accusation in such courts. The affidavit usually required as a preliminary to the issuance of a warrant of arrest is, also, often called a complaint, and is sometimes made the complaint in the prosecution. Such an affidavit, however, is not necessarily the same thing as the complaint herein described.

An information is a formal accusation of crime sworn to and filed by a prosecuting officer. Indictments and presentments are the accusations returned by grand juries. These modes of prosecution will be discussed later.

15. **Affidavit and warrant.**—Although one may be arrested in certain cases without a warrant,[41] yet in most instances the first step necessary in any criminal prosecution is to procure a warrant for an offender's arrest. A warrant of arrest is a written order issued by a magistrate and directed to a peace officer, or to any and all peace officers, or to any private person, commanding him or them to arrest the person described in the warrant, and to bring him before the magistrate issuing the warrant, or, it may be, before any other magistrate authorized to inquire into the offense.

[41] See § 16.

By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him. If it does not, the officer making the arrest is liable to an action for damages.[42]

Warrants for arrest are legally issued only upon a complaint or affidavit made by some competent person, either a private person or an officer, and only upon probable cause. The issuance of such a writ lies in the sound discretion of the court. The particular requirements of the complaint or affidavit are governed more or less by the local statutes. In general, however, such a complaint must be in the form of an affidavit, that is, upon oath, and there are constitutional provisions in many states to the effect that no warrant of arrest shall be issued except upon oath or affirmation first being made. The complaint or affidavit should set forth the nature of the offense, when it was committed, and the name of the accused person. The person making the complaint should state the facts as upon his own knowledge, and not upon mere hearsay. In some states, however, a complaint made upon information and belief is sufficient.[43]

16. **Arrest.**—Arrest is the taking of a person into custody.[44] It consists of actual seizure, or touching, of the body with the purpose of detention. It is said in an early English case that the mere utterance of words of arrest, without touching the body,

[42] 1 Chitty, Criminal Law, p. 39; West v. Cabell, 153 U. S. 78.
[43] State v. Carey, 56 Kan. 84, 42 Pac. 371.
[44] Montgomery Co. v. Robinson, 85 Ill. 174, 176.

is not an arrest, unless the person sought to be arrested submits to the process and goes with the officer.[45] An arrest may be made with or without a warrant. At common law any peace officer may, without a warrant, arrest any person committing, in his presence, a felony or a misdemeanor amounting to a breach of the peace.[46] A private person may, likewise, when he has reasonable cause to suspect that a felony has been committed, arrest, without a warrant, a person whom he reasonably suspects of having committed it. A private person may also arrest, without a warrant, a person whom he believes to have committed a felony, providing the felony has actually been committed. Any one may also, without a warrant, arrest any person whom he sees on the point of committing a felony, or a breach of the peace.

In addition to these cases, the right to arrest without a warrant may be extended by statute, but, as a rule, a warrant is required.

When a warrant is used, the person making the arrest must act within its authority, or he will be liable for false arrest. A person may be arrested for a crime at any time of the day or night, also on Sundays.[47] If necessary, the person making the arrest may break open the doors of a house in order to apprehend the accused.[48]

[45] Horner v. Battyn, Buller's N. P. 61 (1739). See, also, Hershey v. O'Neill, 36 Fed. 168.

[46] Com. v. Carey, 12 Cush. 246 (Mass.). For other misdemeanors a warrant is necessary. Com. v. Wright, 158 Mass. 149, 33 N. E. 82.

[47] State v. Smith, 1 N. H. 346.

[48] Com. v. Tobin, 108 Mass. 426.

17. **Extradition.**—Extradition means the delivery or surrender of an alleged criminal by one sovereign or government to another.[49] Among nations, the grounds or causes for which persons accused of crime are delivered up to the government seeking them, are generally regulated by treaty. Among the states of our own country, the matter is controlled by the Federal Constitution.

The national government has the sole power to provide for the surrender of fugitives from justice by foreign countries, and an individual state of our union has no authority to regulate such matters. It is provided by the Federal Constitution that no state shall, without the consent of Congress, "enter into any agreement or compact with another state or with a foreign power."[50]

18. **Same subject—Interstate extradition.**—It is provided by the Constitution of the United States that "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."[51]

The procedure to be followed in order to secure the return of such a fugitive is outlined in the federal statutes.[52] There should be a written demand or requisition by the governor of the state in which the crime was committed. In the District of Colum-

[49] Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. 484.
[50] Art. I, § 10. And see Holmes v. Jennison, 14 Pet. 540 (U. S.).
[51] Art. IV, § 2.
[52] U. S. Rev. Stats., §§ 5278, 5279.

bia, however, the demand should be made by the chief justice of the District. The demand is made upon the governor of the state in which the accused person is found. The written demand or requisition should be accompanied by a copy of the indictment, if an indictment has been found, or by a copy of an affidavit charging the offense. The papers in the case should be certified by the demanding governor, and should be under the seal of the state.[53] In some jurisdictions it has been held that a mere complaint, or an information, cannot be substituted for the required affidavit or indictment.

If the papers are in correct form, it is the duty of the governor upon whom the demand is made to honor them and to issue a warrant for the arrest of the person named in the requisition. If, however, the governor refuses to discharge this duty, there is no power delegated to the general government to use any coercive means to compel him to act.[54] The governor of the demanding state appoints an agent to receive the fugitive when delivered up by the executive of the other state. The costs in cases of extradition are paid by the state making the demand.

When such a fugitive has been brought back into the state where the crime was committed, the weight of authority is to the effect that he can be tried for other offenses also, in addition to the offense for which he was extradited.[55] Some states, however,

[53] For procedure in interstate extradition, see Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, LEADING ILLUSTRATIVE CASES.

[54] Kentucky v. Dennison, 24 How. 66 (U. S.), 16 L. Ed. 717.

[55] Lascelles v. Georgia, 148 U. S. 537, 13 Sup. Ct. 687.

hold that he cannot be tried for another offense, at least not until he has had a reasonable time in which to leave the state.[56]

19. **Same subject—Foreign extradition.**—A sovereign nation is under no obligation to surrender to another country a person accused of crime in the latter, and it is not customary to surrender such fugitives from justice in the absence of a treaty providing for extradition. The United States has, however, treaties with practically all of the other nations regulating such proceedings. These treaties vary in the specific offenses for which offenders may be returned, political offenses, however, not being included. The requisition for foreign extradition is made by the Secretary of State of the United States to the head of the foreign government.[57] In case of crimes against the United States, the Attorney General addresses his application to the Secretary of State. When a state wishes to extradite a fugitive, the application to the Secretary of State is made by the governor. The application should be accompanied with a copy of the indictment, if any, also with a copy of the warrant of arrest and its return. The name of the accused person should be stated, of course, and it should also appear that the offense charged is one included in the treaty with the particular foreign nation. The papers should be sent in duplicate to the federal Secretary of State, one set being kept in his office, the other set being transmitted abroad. An agent to receive the accused is

[56] State v. McNaspy, 58 Kan. 691, 50 Pac. 895, 38 L. R. A. 756.
[57] In re Heilbroun, 11 Fed. Cas. No. 6,323.

appointed under authority of the President and this agent delivers the person when arrested to the authorities of the state. When a requisition comes from abroad, it is provided by the federal statutes[58] that the various judges of the federal courts, judges of courts of record of the various states, and United States Commissioners may examine the papers and order the commitment of the accused for extradition. Any person claiming that he is unlawfully held may resort to the writ of habeas corpus.[59]

20. **Preliminary examinations.**—Returning to the steps of procedure after an arrest has been made, the first right of an accused person is, as a general rule, to have a prompt preliminary examination before some magistrate authorized to inquire into his offense.[60] The object of this examination is to determine whether there is probable cause to hold the accused for trial. In many states, a preliminary examination is required by statute before an information can be filed against an accused person for trial in a superior court. This examination may, in most states, be waived by the defendant if he so desires, and in such a case he will be bound over to the superior court, as a matter of course. In offenses against a state, the examining magistrate is usually a justice of the peace. For satisfactory reasons, the examination may be postponed or continued at the discretion of the magistrate. There

[58] U. S. Rev. Stats., § 5270.

[59] In re Stupp, 23 Fed. Cas. No. 13,563. For habeas corpus in interstate extradition, see Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, LEADING ILLUSTRATIVE CASES.

[60] Coffield v. State, 44 Neb. 417, 62 N. W. 875.

is no jury in such a preliminary proceeding, but the witnesses are examined, and the accused may have compulsory process for the purpose of bringing his witnesses into court. He is also entitled to the aid of counsel. The examination is not conducted with the formalities of a trial, and it is not necessary that the magistrate should be convinced beyond a reasonable doubt. It is sufficient if he is satisfied from the evidence that there is probable grounds of the defendant's guilt.[61] On the other hand, if the magistrate is satisfied that there are no such grounds, it is his duty to discharge the accused. The substance of the testimony is required, by statute in some states, to be reduced to writing by the court, and, in some jurisdictions, the witnesses are required to sign the statements of their individual testimony. If, in any case, the prisoner is discharged, he may again be arrested and examined upon further evidence for the same offense. A preliminary examination is not a trial, and one examination does not preclude another.[62]

21. **Commitment and bail.**—When the examining magistrate is satisfied that there is sufficient evidence to warrant the holding of the accused for trial, he issues an order of commitment or, if the offense is a bailable one, admits the accused to bail. The order, or warrant, of commitment, sometimes called the mittimus, is an order directed to an officer of the court commanding him to deliver the prisoner into the custody of the jailer, to be detained by him

[61] State v. Hartwell, 35 Me. 129.

[62] Ex parte Robinson, 108 Ala. 161, 18 So. 729.

until the time of trial, or until the accused is discharged by due process of law. The order of commitment should specify the charge, and state that there is probable cause for his, the accused's, detention. In order to secure the attendance of witnesses it is also generally provided, by statute, that the magistrate may, in his discretion, require them to enter into a recognizance, that is, to give bond, with satisfactory sureties, that they will appear at the trial for the purpose of testifying. In default of such bond, they may be detained in custody.[63]

It is generally provided by the constitutions, or statutes, of the several states that persons accused of crime may be admitted to bail, except in capital cases, or in case of other felony where the proof is evident or the presumption great. The right of bail, also, is provided for by the federal statutes.[64] Beyond the federal[65] and state constitutional provisions that excessive bail shall not be required, there is usually no limit upon the amount of bail, the matter being within the discretion of the court. The statutes usually regulate all the proceedings connected with the bailing of accused persons, particularly with reference to the qualifications of bondsmen. When a person is bailed he is delivered into the custody of his bondsmen. They are bound by a penal obligation to insure his presence at the trial. Should he fail to appear, except in case of death or

[63] Markwell v. Warren Co., 53 Iowa 422.
[64] U. S. Rev. Stats., §§ 1015, 1016.
[65] Amend. VIII.

other valid reason, his bondsmen will be liable upon their bond. A bondsman may, before the trial, redeliver, at any time, the accused into the custody of the court. Should the accused wilfully fail to appear, he may be rearrested at any time, and committed for trial. The forfeiture of the bond does not, in any way, relieve the defendant from standing trial whenever he can be brought before the court.[66]

22. **Trials by inferior courts.**—It was stated in connection with the jurisdiction of courts that, generally, by statute in the various states, violations of city ordinances and misdemeanor cases against the state are tried in inferior courts known as police courts and courts of justices of the peace. Such trials are, as a rule, conducted without a jury, although some statutes authorize a jury upon the demand of the defendant, or upon a demand of either the prosecution or the defense. That no provision is made for a jury trial in the case of petty offenses violates no constitutional right of the accused. The preservation to accused persons of the right of trial by jury, as provided generally in our various constitutions, means the right of trial by jury as it exists at common law, and such a right does not exist at common law in summary trials before inferior magistrates for minor offenses.[67] The statutes generally provide for the procedure in such cases, and such statutory provisions must be observed. The mode of accusation is usually

[66] State v. Meyers, 61 Mo. 414.
[67] McInerney v. Denver, 17 Colo. 302, 29 Pac. 516.

that of a written complaint or an information. The offense must be alleged with certainty, and where the offense is a statutory one, a complaint charging the offense in the language of the statute will be usually sufficient, providing the statute contains all the necessary elements of the offense.[68] Complaints may usually be amended before the trial, and even after it has begun, providing the rights of the accused are not prejudiced thereby. The accused has the right to be represented by counsel. In case the accused pleads not guilty, the witnesses are examined as in an ordinary trial, and upon a finding of his guilt by the court, or a similar verdict by the jury, providing a jury is used, the court renders judgment. The sentence usually consists of a fine or imprisonment, or both. In case of execution of sentence of imprisonment, the defendant is committed to a city or to a county jail. The statutes generally provide, however, for an appeal to a superior court, where, upon appeal, the case is tried *de novo* (anew).

[68] State v. Louver, 26 Neb. 757, 42 N. W. 762.

CHAPTER III.

INDICTMENTS AND INFORMATIONS.

23. **Definitions.**—In the prosecution of crimes that are not tried by inferior courts, the mode of accusation is almost always either by way of indictment or by information. An indictment is an accusation in writing presented by a grand jury to a competent court. In some states all felonies must be prosecuted by indictment, and the Federal Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."[69] This requirement applies, however, only to federal courts, and does not affect prosecutions in a state court.[70] In a number of states, as a matter of fact, the law provides that the usual mode of prosecution shall be by information. An information in its form is practically the same thing as an indictment. It is an accusation in writing presented to a competent court by a public prosecutor, instead of going through the hands of a grand jury. A presentment differs from an indictment in that a bill of indictment is drawn and submitted to the grand jury by the prosecuting

[69] Amend. V.

[70] Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292.

officer for their consideration, but a presentment is an accusation by the grand jury upon their own initiative, which is based upon their own knowledge or investigations and not originated by the public prosecutor.[71] Indictments and presentments, therefore, are both presented to the court by a grand jury. An information, however, has nothing to do with a grand jury.

24. **The grand jury.**—The grand jury is an ancient institution of our English law. It is called a "grand" jury to distinguish it from an ordinary trial jury, which is known as a "petit" jury. A grand jury consists, at common law, of not less than twelve and not more than twenty-three men.[72] The statutes sometimes provide for a smaller number than twenty-three. Twelve of them may present an indictment against an accused person, it not being necessary that they should all agree, as in case of a petit jury. They must be competent, that is, they must have the qualifications prescribed by statute; or, at common law, they must be "good and true men," citizens of the county. When summoned into court they are sworn to "inquire diligently and true presentment make" of all matters given them in charge. They are charged, or instructed by the court, as to their duties. The court appoints a foreman, or they may elect one from their number. They conduct a secret and ex parte examination[73] of witnesses, who are summoned as ordinary wit-

[71] See 4 Blackstone, Commentaries, p. 301.

[72] 2 Hale P. C. 161. As to the ancient grand jury, see Hurtado v. California, 110 U. S. 516.

[73] Elbin v. Wilson, 33 Md. 135, 144.

nesses are, and are sworn in court. Grand jurors must be duly qualified to serve, and their proceedings must be conducted in accordance with law, else indictments found by them may be dismissed as void.

In some states, as was pointed out in the preceding paragraph, grand juries are not necessary for the purpose of instituting criminal prosecutions, the method of information, instead of indictment, being the usual practice. The statutes in such states, however, may provide for the calling of a grand jury in certain cases.

25. **General requirements of indictments.**—The same general principles as to form and contents, and rules of pleading, apply equally to informations, indictments, and presentments. The requisites of these several modes of accusation are considered here under the head of indictments.

26. **Same subject—Formal parts.**—The formal parts of the indictment proper are the commencement, the statement (or the charging part), and the conclusion. In addition, there is a preliminary clause, called the caption, although it is not, strictly, a part of the indictment.

27. **Same subject—Caption.**—The caption contains the title of the cause, and shows, generally, the name and authority of the state (or United States), the name of the court, the venue (usually), and, often, the time of finding; for example, in a federal court:

"In the District Court of the United States of America, holden in and for the district of ———,

of April term, in the year of our Lord one thousand nine hundred and fourteen."

A caption used in New York is as follows:

Court of ————, of the County of ————.

The People of the State of New York against A. B. (omitting the time).

The venue may, as a matter of practice, be stated in the caption, in the commencement, or in the margin of the indictment, as, for example, "Suffolk, to wit."[74] When stated in the margin or caption, the phrase "of the county aforesaid" is proper in the commencement.

28. **Same subject—Commencement.**—The commencement of an indictment is a recital that the charge is presented by the grand jury on oath, as, for example: "The jurors (or grand jurors) of the State of Calif, on their oath, present, that * * *, etc. Commencements, however, as is likewise true of captions, vary in different states, and are often governed more or less by statute.

29. **Same subject—Statement.**—The statement, or the body, or the charging part of the indictment, is its principal part. It contains the accusation against the offender.

30. **Same subject—Conclusion.**—The conclusion of an indictment is the formal phrase at the end, showing that the peace of the state has been violated by the offense. The conclusion generally takes the following form:

"Against the peace and dignity of the State,"

[74] Or, "Suffolk, ss." The ss. is a corruption of sc., the abbreviation of the Latin *scirelicet* or *scilicet*, meaning be it known, or to wit.

or, in case of a statutory offense, "Against the peace of the State and contrary to the form of the statute in such case made and provided."

31. **Same subject—Signing and indorsing.**—An indictment is generally signed by the foreman of the grand jury, although this may not be necessary in all states.[75] In some states, the signature of the prosecuting attorney is also required by statute. The indictment, if returned by the grand jury, should be indorsed as "A true bill," although this is not required in all states.[76] In some states, moreover, it is required by statute that the names of the witnesses examined by the grand jury (or by the prosecuting attorney in case of an information) shall be indorsed on the indictment or information.

32. **General rules of pleading—Certainty.**—There are certain rules of pleading which must be carefully observed in the drawing of indictments. In the first place, the facts must be pleaded, or stated, with certainty, that is, the particular offense must be clearly specified so that it may be identified.[77] The accused has a right to be informed of the exact charge he has to meet,[78] and he cannot be held to answer for any crime unless the same is fully and plainly, substantially and formally charged against him.

The general rule as to certainty in indictments is held to be that certainty to a certain intent is all

[75] State v. Hill, 48 W. Va. 132, 35 S. E. 831.

[76] See note 75.

[77] State v. Messenger, 58 N. H. 348; State v. Doran, 99 Me. 329, 59 Atl. 440, LEADING ILLUSTRATIVE CASES.

[78] Com. v. Terry, 114 Mass. 263.

that is required, that is, "what upon a fair and reasonable construction may be called certain, without recurring to possible facts, which do not appear."[79] Pleadings, however, need not be made with greater certainty than the conditions admit, and when an offense cannot be stated with complete certainty, it is sufficient to state it with such certainty as the circumstances will permit.

33. **Same subject—Positiveness.**—Closely connected with the preceding rule is the further rule that all material allegations in an indictment must be positive and direct. Conclusions, arguments, and beliefs should not be stated, but facts. An indictment, moreover, cannot be double, that is, one cannot be charged with two or more offenses in the same count.[80] This makes it bad on the ground of duplicity, or doubleness. Further, it must not be repugnant, because if one material part of an indictment is repugnant to another part, the whole is void.[81] For example, an indictment charging with a crime "Douglas Jones, alias Dug Jones, whose true Christian name is to the grand jurors unknown," was held bad for repugnancy.[82] Where, however, the contradictory or repugnant matter is immaterial, merely superfluous and redundant, and does not materially alter a preceding averment, it may be rejected as surplusage.

[79] Heard, Criminal Pleading, p. 105.

[80] See § 47.

[81] State v. Lockwood, 119 Mo. 463, 24 S. W. 1015, LEADING ILLUSTRATIVE CASES.

[82] Jones v. State, 63 Ala. 27. But see Taylor v. State, 100 Ala. 68, 14 So. 875.

Again, the statements must not be in the alternative, that is, the indictment must not charge one with committing one or the other of two offenses. For example, if an indictment states that the accused set fire to, or caused fire to be set to, a certain dwelling, it is void, since it does not charge a specific offense but leaves it uncertain whether he committed one offense or the other, whether he is charged as a principal or as an accessory before the fact.[83] Where the word "or" is used before a synonym of that which precedes, or is used in a statute in the sense of "to wit," being merely explanatory of the first word or clause, an indictment which thus follows the words of the statute is good.[84]

34. **Same subject—Language—Abbreviations—Erasures.**—In England, all indictments were in the Latin language till the year 1735, when Latin was abolished and English substituted by statute.[85] They have always been in the English language in this country, and some of our statutes require them to be.[86] It is better practice to use no abbreviations in drawing an indictment, but well-known abbreviations, such as the abbreviations of the months, A. D. (anno domini), the dollar sign, and numerals for the dates, are permissible, and are in constant use. Erasures and interlineations should also be avoided, but they do not necessarily vitiate an indictment. In fact, when interlineations occur in an indictment it

[83] Com. v. Grey, 2 Gray 501 (Mass.), 61 Am. Dec. 476.
[84] State v. Snyder, 182 Mo. 462, 82 S. W. 12.
[85] 6 Geo. II, chap. 6.
[86] See People v. Ah Sum, 92 Cal. 648, 28 Pac. 680.

is the presumption that they were made before the grand jury returned it, although the accused may show the contrary.[87] A material alteration, however, made after the indictment is returned, even the addition of a material word, will render the indictment void.[88]

35. **Particular allegations—In general.**—In order to be sufficient in law, an indictment must contain an allegation of every fact necessary to constitute the criminal charge preferred by it. It must aver that the person or persons accused have committed the particular crime alleged, and it must state all the elements of the offense charged. Facts judicially noted should not, however, be set out, and, likewise, matters of evidence and matters of defense should not be inserted. For example, it is not necessary to say that a homicide was not excusable. That is a matter which, if pleaded, should come from the defense. As has been previously stated, matters need not be pleaded with greater certainty than the circumstances will permit, and where the particular facts are known only to the accused, the averments may be general.[89] When matters of required description, not essential elements, however, are unknown to the grand jury, it is permissible to aver in the indictment that a more particular description cannot be given since it is unknown to the grand jury.

36. **Naming the accused.**—The indictment must allege the name of the accused. Both the Christian

[87] State v. Vest, 21 W. Va. 796.

[88] See note 87.

[89] People v. Wessel, 98 Cal. 352, 33 Pac. 216.

name and the surname should be stated. If the name of the accused is unknown it is customary to indict him by a fictitious name (e. g., John Doe), averring at the same time that he is a person whose name is to the grand jury unknown. There should be some description, however, of the accused, in such a case, in order that he may be identified, since it is not sufficient to allege merely that his name is unknown.[90]

One may be indicted by the name by which he is usually known. In some states it is permissible to use an initial, or initials, instead of the full Christian name.[91] An erroneous spelling of a name will not render the indictment bad, providing the sound, as pronounced, is the same. This is known as the doctrine of *idem sonans* (sounding the same). A middle name is not regarded at common law as a part of one's name. The use of this name, however, will not affect the indictment, and an error in its use is immaterial.

If a corporation is indicted, its correct corporate name should be alleged.

37. **Time and place.**—The time and place of the crime must be alleged, unless some statute otherwise provides.[92] These averments regularly follow the name of the accused, as, for example: The grand jurors, etc., present that A. B., on (or about) (here insert time), at (here insert place), etc. Any failure in alleging the time and place in connection with each and every material fact in the

[90] U. S. v. Doe, 127 Fed. 982.

[91] State v. Appleton, 70 Kan. 217, 78 Pac. 445.

[92] Fleming v. State, 136 Ind. 149, 36 N. E. 154 (that time may be omitted).

indictment is a fatal defect, unless otherwise provided by statute. The day, the month, and the year should be stated. It is not necessary, however, to state the hour, unless, in case of some statute, the hour is a material element of the offense. In an indictment for burglary at common law it must appear that the crime was committed in the nighttime, likewise, if such be the fact, in statutory burglary, where a different penalty is provided for breaking and entering at night.

The time stated in the indictment must be a date before the bringing of the prosecution. It is not necessary, however, that the time alleged be the correct date, unless this is a material matter, nor is it necessary to prove that the crime was committed on the date alleged. It is sufficient if the proof shows that it was committed at any other time, providing the prosecution is not barred by the Statute of Limitations, and providing, also, that it was not committed after the finding of the indictment.

When the offense is a continuing one, it is alleged with a continuando, that is, by stating that it was committed on a certain day, and divers other days between such certain day and another day certain.

The place must also be alleged. This is important both to show the territorial jurisdiction of the court and the venue, or county. Where, however, the venue is given either in the caption, the commencement, or the margin, it may be alleged by referring to it as "the county aforesaid." In some particular offenses, the nature of the locality must also be

stated, as, for example, a public place, street, or highway, in case of an affray.

38. **"Then and there."**—As stated above, an averment of the time and place must be repeated, at common law, with each and every material allegation of the offense. But in order to avoid the cumbersome method of repeating literally the day, and month, and year, also the county, as first set out, the phrase "then and there" is used as often as each new material part of the offense is alleged.

39. **Names of third persons.**—As in the case of the accused, the names of other persons, mentioned in the indictment either as individuals against whose person the crime has been committed, or as the owners of property material to the subject matter of the offense, must be alleged with certainty. The Christian name and surname should both be given. The doctrine of *idem sonans* applies, however, as in the case of the name of the accused. A person may be described by the name by which he is generally known, and if unknown, the same rule applies as in case of the defendant, that is, he may be described as unknown to the grand jurors.[93] Care must be taken in giving the names of the owners or possessors of property, since such names become a part of the description of the property, and variance here between the allegations and the proof would be fatal.[94]

40. **Intent and knowledge.**—The general crim-

[93] Hamilton v. People, 24 Colo. 301, 51 Pac. 425.
[94] McGary v. People, 45 N. Y. 153.

inal intent, which is an essential in all crimes, need not be averred where a crime is actually committed, since the intention will be presumed, and it need not be alleged or proved. In such cases, the intent is included, as a matter of law, in the act, and is proved by proof of the act itself.

Where, however, by common law or by statute, a certain state of evil mind must accompany the offense, and is, by the very definition of the offense, a necessary part of it, there must be an allegation of it. In such cases the criminal mind is usually shown by an allegation that the accused did the act wilfully or fraudulently or maliciously. Treason must be laid as having been done "traitorously"; murder, "with malice aforethought"; burglary, "burglariously"; and all felonies, "feloniously."

Likewise, where, by common law or by statute, guilty knowledge is an essential element of the offense, such knowledge becomes material and must be alleged.[95] Uttering forged paper or obtaining property under false pretenses requires, for example, a knowledge that the paper is forged, or that the representations are false.[96] In such cases, the word "knowingly," or other equivalent word or words, should be used.

Some offenses, both at common law and under statutory definition, require a specific intent as distinguished from a general intent. In all such crimes the particular intent is a necessary ingredient of

[95] People v. Smith, 103 Cal. 563, 37 Pac. 516.

[96] Or, at least, no knowledge or belief that they are true. See People v. Behee, 90 Mich. 356, 51 N. W. 515.

the offense, and must be alleged in the indictment. For example, forgery requires an intent to defraud, larceny an intent to deprive the owner permanently of the property, burglary an intent to commit a felony in the premises entered. Many statutory offenses also require a specific intent, as assaults with intent to kill or to rape. In indictments for such crimes, the specific intent must be alleged with distinctness and precision.[97] In attempts, also, the specific intent must be set out.[98]

41. **Words of art.**—Certain technical words or phrases, called "words of art," are by common law an essential part of the description of certain offenses, and unless they are made unnecessary by local statutes or decisions, they must be employed in order to make the indictment good. Among these terms are the words "feloniously," "burglariously," and "with malice aforethought," already mentioned. In murder, the words "did kill and murder" are required; in rape, "did ravish," and perhaps, "carnally know"; in robbery, "forcibly and against the will"; in larceny, "took and carried (or led) away"; and in perjury, "wilfully and corruptly swore falsely."[99] Being technical words, and having an established meaning, no other words can be substituted for them.

42. **Statutory offenses.**—In drawing an indictment or information for a statutory offense, there must be certainty in the allegations that the accused

[97] Com. v. Hersey, 2 Allen 173 (Mass.).
[98] State v. Doran, 99 Me. 329, 59 Atl. 440, LEADING ILLUSTRATIVE CASES.
[99] See U. S. v. Edwards, 43 Fed. 67.

committed or omitted the acts forbidden or required by the statute. In case the statute makes an act an offense only when done under certain circumstances and with a certain intent or guilty knowledge, such circumstances, intent or knowledge must be also alleged. It is sometimes said that it is sufficient, in statutory offenses, to follow the words of the statute. This practice may, however, be fatal to an indictment. If the statute, in describing the offense, contains all the necessary elements of the crime, then an indictment which follows the very words of the statute may, and will generally, be sufficient. On the other hand, if any one of the essential elements be omitted or mis-stated, an indictment containing nothing more than the words of the statute will be insufficient. Statutes frequently use only general terms when describing offenses, omitting important ingredients. In such cases, an indictment merely following the statute would violate the rule that every essential element of the crime must be charged with certainty and particularity.[1]

43. **Negativing provisos or exceptions.**—Sometimes a statute which creates an offense contains a proviso or exception which exempts certain classes of persons from its operation. If the exception is in the enacting clause, or if it is contained in the description of the offense so as to be an inherent part of it, the indictment must show by a negative averment that the defendant or the particular act alleged was not within the exception. Where, how-

[1] State v. Doran, 99 Me. 329, 59 Atl. 440, LEADING ILLUSTRATIVE CASES.

ever, the exception or proviso is not in the enacting clause, or not incorporated directly or by way of reference in the description of the offense as an ingredient of it, the indictment need not negative it, since, in such case, it becomes a matter of defense.[2]

44. **Describing property.**—It is a fundamental rule of pleading that property which is the subject matter of an offense must be sufficiently described. Formerly, great particularity as to the description of personal property was necessary, but statutes, in many states, have obviated, more or less, this minuteness of detail. In some crimes, particularly larceny and embezzlement, the value of the property must also be stated, since the degree of the offense, and the consequent punishment, depend thereon.[3] In describing real property, it will be sufficient to use such language as will identify it. Thus, in the case of burglary, "the dwelling-house of A. B." will usually be sufficient, since, the place of the crime being stated, there will ordinarily be no difficulty in identifying a person's dwelling-house. Generally, in the case of real property, an allegation of the town or city in which it is situated will be a sufficient description.

With reference to personal property, the description must be sufficient to identify it, and it must bring the property within the purview of the statute, and inform the accused with certainty of the particular property which is made the basis of the charge.[4] In larceny and embezzlement, stolen

[2] State v. Gallagher, 20 R. I. 266, 38 Atl. 655.
[3] State v. Perley, 86 Me. 427.
[4] Com. v. Strangford, 112 Mass. 289.

money must, unless otherwise provided by statute, be described according to its particular kind and denomination, and the description of paper money should be sufficient to identify the particular note or certificate.

45. **Written instruments.**—It is the common law rule that written instruments that constitute the gist or the foundation of an action, as, for example, in such offenses as forgery, libel, and sending threatening letters, should be set out verbatim (literally) in the indictment.[5] Written instruments that have been lost or destroyed, may be described with such certainty as the circumstances will permit, the reason for their not being set out in full being stated. Obscene matter need not be copied into indictments, provided the reason for such omission is alleged. A writing, however, that is merely incidental to the charge, or referred to as a part of the description of an offense, and not forming the very basis of the offense, may be set out according to its purport or substance, or may be described in a general way.[6] The word "tenor" when used in describing written instruments, as "according to the following tenor," means a verbatim copy. The word "purport" on the other hand, as "of the following purport," means the substance of the instrument.

46. **Inducement—Innuendo.**—Inducement means literally a leading up to. In pleading, it means matter by way of explanatory preamble or introduction to the main allegations. For example, in libel, if the

[5] Whitney v. State, 10 Ind. 404.

[6] Brown v. Com., 2 Va. Cas. 516 (a letter sending a challenge to fight a duel).

written words do not upon their face appear libellous, explanatory facts may be necessary in order to show how they are libellous. The office of the innuendo (Latin, signifying "meaning") is to show the meaning of the defendant by way of reference to the explanation given in the inducement.[7] Matters of inducement, not being a part of the charge against the accused, need not be set out with absolute certainty, a general mode of allegation being sufficient.

47. **Joinder of offenses.**—It has already been pointed out that the joinder of two or more offenses in one and the same count of an indictment, is bad on the ground of duplicity. In order, however, that the proof may not be at variance with the indictment, it is permissible to state the same offense, as committed at different times, and in different ways, in separate counts. The fact that one count is not consistent with another does not amount to repugnancy, since that objection is properly raised not to separate counts but to matter in the same count.[8] As many different counts setting forth the same offense may be used as the pleader wishes.

Two or more separate offenses may also, at common law, be charged in the same indictment, in different counts, without making the indictment bad, although an election of the counts, where the offenses are not of the same nature, would be compelled.[9] Where, however, the offenses are of the same general nature, the one having a relation to the

[7] 3 Chitty, Criminal Law, 873, 875a.

[8] State v. Mallon, 75 Mo. 355.

[9] Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410.

other, and based upon the same general facts, they may be joined in the same indictment, and in the discretion of the court may be tried together. For example, one count of an indictment may charge a murder, another count, upon the same facts, may charge manslaughter. In the same way, larceny and embezzlement may be charged in different counts,[10] also a forgery and the uttering of forged paper. In England and in some of our states, a felony and a misdemeanor cannot be joined in the same indictment,[11] but in other states such a joinder is permitted, providing, of course, that the offenses are related.[12]

The question of joinder of offenses is governed in some states by the statutes, which should always be consulted. In other states, no joinder of two offenses, although arising out of the same transaction, is permitted.

When separate counts are used in an indictment, each one, as to the requirements of pleading, is considered separately, and must be complete in itself. The commencement of a second or subsequent count is generally, "And the grand jurors (or jurors) aforesaid, upon their oath aforesaid do further present," etc.

48. **Surplusage.**—Matter not necessary to the charging of an offense, and immaterial in its character, may be rejected as surplusage. Surplusage, however, should be always avoided, since matter

[10] Stephens v. State, 53 N. J. L. 245, 21 Atl. 1038.
[11] Castro v. R., 6 App. Cas. 229 (Eng.); Hilderbrand v. State, 5 Mo. 548.
[12] George v. People, 167 Ill. 447, 47 N. E. 741.

inserted by way of fulsome description, although unnecessary, is no longer immaterial, and must remain and must be proved. If, for example, an indictment for the larceny of a horse describes him as "a bay horse, four years old, having two white feet, and a star upon his forehead," such a particular description, although not required, must stand. No part of it can be rejected as surplusage. It is a material part of the offense, and the larceny of just such a horse must be proved, or the case fails.[13]

If, however, the whole of a statement can be stricken out without destroying the accusation, it is not necessary to prove it. Where matter is merely surplusage, it has no effect upon the indictment.

49. **Amendments.**—At common law, no amendment could be made to an indictment except by the same grand jury that returned it. The question, at the present time, is, however, one of statutory regulation in most states, and as a general rule, indictments may be amended by the court so far as errors in mere matters of form are concerned, at any time, provided the defendant will not be prejudiced in his rights thereby.[14] Amendments as to form are illustrated, for example, by corrections of errors in time and place, names of persons, and description of property, where such corrections will not affect the accused's rights of defense. Statutes allowing such amendments are constitutional, although amendments as to the substance of an indictment could not, of course, be allowed when the constitution re-

[13] State v. Gilbert, 13 Vt. 647.

[14] People v. Johnson, 104 N. Y. 213, 10 N. E. 690.

quires that an accusation shall be returned by a grand jury.[15]

Informations, being the accusation of the public prosecutor, may, by force of statute, be amended as to matter of form, with leave of court, at any time, either before the trial, or even during the trial before the verdict. They may also be usually amended even as to matters of substance before the trial.

50. **Forms.**—Several forms of indictments will be found following the final pages of this article. The illustrative cases appended hereto also contain some indictments.

[15] State v. McCarthy, 17 R. I. 370, 22 Atl. 282.

CHAPTER IV.

PROCEDURE BETWEEN INDICTMENT AND TRIAL.

51. **Bench warrant.**—If the accused is already in custody upon the finding of an indictment or the filing of an information, no further process to secure his appearance is necessary. It often happens, however, that one is indicted before his arrest. In such a case a bench warrant is secured, which is a warrant issued by a court of record of general jurisdiction. A bench warrant may briefly state the fact of indictment and describe the offense generally.[16]

52. **Arraignment.**—The word arraign means to call to account, to call before the bar of the court. If the accused is in custody, the first step after the finding of the indictment, or the filing of the information, is to arraign him. The arraignment consists, at common law, in reading over the indictment to the accused and asking him whether he is guilty or not guilty. In modern practice the reading is often omitted, since, in many jurisdictions, it may be waived, the statutes generally providing for the furnishing of a copy of the accusation before arraignment.[17]

Arraignment and plea are necessary steps in the procedure of a case, since without a plea no issue is formed, and no valid judgment can be rendered.

[16] Brady v. Davis, 9 Ga. 73.
[17] Minich v. People, 8 Colo. 440, 9 Pac. 4.

Arraignment may, however, be waived in some jurisdictions by a personal appearance and submission to trial. Should the defendant refuse to plead, a situation known as "standing mute," the court may enter a plea of not guilty for him.[18]

If the defendant pleads not guilty, the state is bound to prove affirmatively every fact and circumstance constituting the offense as stated in the indictment. Under such a plea, the defendant may show that he did not commit the crime, including any matter that would justify or excuse it. Likewise, his insanity as a defense, or the Statute of Limitations, may be set up under the plea of not guilty.

Should the defendant plead guilty, he thereby expressly confesses all the facts duly charged in the indictment. Such a plea is, also, a waiver of all technical objections to the indictment. If it is made upon a full comprehension of all the facts, nothing further remains to be done but to impose sentence. In some states a plea of guilty cannot, under the statutes, be received by the court in a capital case. Although the prisoner may wish to plead guilty, a plea of not guilty must be entered for him, and conviction can follow only by a verdict of the jury.[19]

For the purposes of the case before the court, a plea of *nolo contendere* (I do not wish to contend) is equivalent to a plea of guilty. This plea is admissible, at common law, only in misdemeanor cases, and only in the discretion of the court.[20] By such a

[18] Com. v. Place, 153 Pa. St. 314, 26 Atl. 620.

[19] So in New York. See N. Y. Code Cr. Proc., § 332. See, also, State v. Genz, 57 N. J. L. 459, 31 Atl. 1037.

[20] Com. v. Ingersoll, 145 Mass. 381, 14 N. E. 449.

plea, the accused says that he will not contend with the state and puts himself upon the clemency of the court. Sentence is pronounced as in case of a plea of guilty, but under such a plea it cannot be shown, in a subsequent civil action for damages against the accused upon the facts arising out of the same transaction, that he has pleaded guilty to these facts in a criminal prosecution.[21]

53. **Preliminary motions and pleas.**—When thus brought to the bar of the court and arraigned, the accused, instead of pleading to the indictment, may move to quash it, or he may plead to the jurisdiction of the court, or in abatement, or he may plead specially in bar. It is a rule of pleading that pleas must be made in due order. Consequently, when an accused person has any special matter to plead either in abatement or in bar, or if the indictment is demurrable, he should plead the special matters, or demur, before pleading the general issue.

54. **Motion to quash.**—Where an indictment, or information, is so defective upon its face that no valid judgment could be rendered upon conviction, the proper procedure is to move to quash (or annul) the same, and this is done upon motion of defendant. Should the representative of the people become satisfied that no valid judgment could be rendered under the information or indictment in question, he should then, in the case of an indictment, enter a nolle prosequi, and seek return of a new indictment at the hands of the grand jury. In the case of an information the proper practice, under like circum-

[21] Com. v. Horton, 9 Pick. 206 (Mass.).

stances, is to withdraw the information and all proceedings thereunder and file a new and sufficient information, although it ought to be said in this connection that the courts, and more especially the federal courts, have exercised their powers and detained defendant in custody, pending the return of a new indictment or the filing of a sufficient information.

Although a motion to quash an indictment for substantial defects therein may be made at any time before the verdict, yet the proper time to make such motion is before offering the special pleas. For mere formal defects, the motion must be made before the jury is sworn, and should also be made in its proper order, that is, before the various pleas.

The motion is addressed to the discretion of the court, and when well taken will generally be sustained. As a general rule, however, a refusal to quash is not ground for error,[22] and a refusal does not prevent a motion of demurrer or a motion in arrest of judgment.[23] If the indictment is quashed, a new indictment may be returned.

55. **Plea to jurisdiction.**—By this plea, the defendant totally denies the authority of the court to try him. A plea to the jurisdiction is made where an indictment is returned before a court which has no jurisdiction either of the person or of the offense. It seems, however, that a defendant cannot include in such a plea the alleged fact that the crime, if any, was committed at some place beyond the territorial

[22] People v. Davis, 56 N. Y. 95, 100.
[23] Ex parte Bushnell, 8 Ohio St. 599.

jurisdiction of the trial court, since this would amount to no more than a plea of not guilty, and such fact can be shown under the latter plea.[24]

56. **Demurrer.**—The accused may also object by demurrer that the indictment, although admitting to be true the facts therein alleged, is, nevertheless, not sufficient in law to show that he is guilty of the crime charged.

Under some of the statutory provisions, the defendant may also demur when it appears on the face of the indictment that the grand jury, by which it was found, had no legal authority to inquire into the crime charged by reason of its not being within the local jurisdiction of the county.[25]

A demurrer may be to certain of the counts when there are more than one, or it may be to them all. In case the demurrer is sustained, the prisoner is dismissed and discharged, although he may be held to answer a new indictment. In case, however, it is overruled, the result varies in different jurisdictions. At common law, the accused risked all upon a demurrer. If the demurrer be judged against the defendant, even in felony, "he shall have judgment to be hanged," says Hale.[26] Later, it lay in the discretion of the court whether or not the accused might be permitted to plead over, or, what amounted to the same thing, be permitted to withdraw his demurrer and plead. In most jurisdictions, at the present time, he may plead over, and this right

[24] 1 Bishop, New Criminal Procedure, § 736.
[25] N. Y. Code Cr. Proc., § 323.
[26] 2 Hale P. C. 257.

is expressly given to the defendant by some of the statutes.[27]

Demurrer is not frequently resorted to, however, in practice, since, as a rule, the same objections can be raised, by arrest of judgment, after conviction.

57. **Plea in abatement.**—In modern practice, pleas in abatement are usually filed only in cases of misnomer of the defendant. In such a plea, however, the defendant must state what his name really is.

A plea in abatement does not go to the merits of the indictment, and is a dilatory plea, and must be pleaded with certainty to every intent. If one pleads misnomer in abatement, and the issue is found against him, he cannot, at common law, as a matter of right, plead over.[28] The reason for this is that if a man pleads a fact which he knows or ought to know to be false, and the verdict is against him, it ought to be final. If the judgment is for the defendant on such a plea, it is that the indictment be quashed. The accused may then be re-indicted for the same offense by his correct name; and he will be estopped from denying that he is not properly designated.[29]

A plea in abatement, if employed, must be pleaded before a plea in bar, since to plead in bar amounts to a waiver of a plea in abatement.[30]

58. **Plea in bar.**—A plea in bar is a plea which, if sustained, completely bars or ends the action. Pleas in bar are either special or general.

[27] So in N. Y. Code Cr. Proc., § 330.
[28] R. v. Gibson, 8 East 107 (Eng.).
[29] Rowland v. State, 126 Ind. 517, 26 N. E. 485.
[30] State v. Dibble, 59 Conn. 168, 22 Atl. 155.

Special pleas in bar are such as preclude the court from discussing the merits of the indictment, either on account of a former acquittal or conviction, or of some subsequent matter, operating in discharge of the defendant, as a pardon. Such special pleas in bar are: (1) Autrefois acquit; (2) autrefois convict; and (3) pardon; that is, a former acquittal, a former conviction, or a pardon. In some states, former jeopardy (autrefois acquit or autrefois convict) may be shown as a matter of defense under the plea of not guilty. In most states, however, such defenses must be pleaded specially, that is, by special pleas in bar. The plea of pardon must always be specially pleaded.[81]

59. **Same subject—Autrefois acquit.**—The plea of former acquittal, as well as that of former conviction, results from the fundamental maxim of criminal jurisprudence, that no man shall be twice put in jeopardy for the same offense. This principle is sanctioned and preserved by the federal and state constitutions as a sacred maxim.

One is "put in jeopardy," in the constitutional sense, when he is put to trial before a court of competent jurisdiction on a sufficient indictment, and has been legally convicted or acquitted by the verdict of a jury, as appears by the record thereof remaining in the court where the verdict was returned.

The mode of procedure upon a plea of former acquittal is, first, to ascertain whether the prisoner could have been lawfully convicted on the first indict-

[81] State v. Keith, 63 N. C. 140. But see Territory of Oklahoma v. Richardson, 9 Ok. 579, 60 Pac. 244.

ment of the crime charged in the second; and then to ascertain whether he was charged by the first indictment with that crime. The first branch of this question is a matter of law to be decided by the court, and the second is a question of fact for the jury. The identity of the offense may be shown by the testimony of witnesses who appeared before the grand jury, as to what they testified to; by a grand juryman; by the prosecutor; or any evidence which would show what crime was the subject of inquiry.[32] In most cases, however, the record itself is the best evidence of an alleged former acquittal or a former conviction.[33]

The fact that an original indictment was quashed, abated or adjudged bad on demurrer, or that judgment thereon was arrested or reversed for a defect therein, does not necessarily show that the accused has been in jeopardy, within the meaning of the constitutional provision. Where, also, there was a mistrial by a disagreement of the jury or by death of a juryman, or where by reason of some defect in the record the trial has proved abortive, and the defendant was not lawfully liable to suffer judgment, he has not been in jeopardy.

60. **Same subject—Autrefois convict.**—This is a plea of former conviction, and is a defense for the same reason as that of former acquittal, under the maxim that no one is punishable twice for the same offense. The same rules apply to it as to the plea of former acquittal.

[32] Heard, Criminal Pleading, pp. 290, 291.
[33] State v. Hudkins, 35 W. Va. 247, 13 S. E. 367.

The only general plea in bar is the plea of not guilty, or the general issue. This plea has already been considered. It may be pleaded if judgment be rendered against the accused on the special pleas in bar.

61. **Entry of nolle prosequi or dismissal.**—The prosecuting officer may, at any time before judgment, stay or dismiss the proceedings by entering upon the record a nolle prosequi, which means that he will no longer prosecute the case.[34] Such an entry may be made with reference to the entire indictment, or to some of its counts, or to one or more of the defendants where two or more are jointly indicted.[35] If such an entry is made before the beginning of the trial, it merely operates as a dismissal of the present proceedings, but does not amount to an acquittal. If entered after the jury is sworn, it operates as an acquittal since the accused cannot again be placed in jeopardy.[36] In some states the common law nolle prosequi has been abolished by statute, and an entry of dismissal by order of the court substituted. In other states, a nolle prosequi can be entered in any case only with permission of the court, while in other jurisdictions leave of the court is required only after the trial has begun. The reasons or grounds for entering a nolle prosequi are, in general, defects in the indictment, lack of sufficient evidence to convict, or a desire to use one of the indicted persons as a witness for the state.

[34] Com. v. McClusky, 151 Mass. 488.
[35] State v. Woulfe, 58 Ind. 17.
[36] U. S. v. Shoemaker, Fed. Cas. No. 16,279.

62. **Rights of the accused before the trial.**—There are certain rights, whether constitutional or statutory, which the accused may claim, in practically all the states, for the purpose of properly preparing for the trial. These rights can be enumerated only in a general way since they often depend upon local statutes or rules of court. He is generally entitled to a copy of the indictment or information, although he may be required to pay the cost of the same; also to a list of the witnesses who are expected to testify against him; also to a list of the drawn jurors; he is, likewise, generally entitled to compulsory process for bringing his own witnesses into court. For proper reasons, such as sickness of counsel, absence of important witnesses, or for lack of reasonable time in which to prepare his defense he may be also generally entitled to a postponement of the day of trial, or even to have it continued to a subsequent term. In some states such postponements or continuances are, however, within the discretion of the court.

63. **Selection of the jury.**—All things being ready for the trial, the next step is the selection of the jury. The right to a jury trial by a person accused of crime, in cases other than petty misdemeanors tried before inferior magistrates, as previously considered, is a common law right preserved both by the Federal Constitution for the federal courts, and also by the constitutions of the several states. In most jurisdictions, a trial by jury cannot be waived by an accused person in indictments for felonies. In other jurisdictions, however, the right is re-

garded as a privilege which may be waived.[37] In such a state, the accused, even in a capital case, may elect to be tried by the court. The jury must consist of twelve men, qualified to act as jurors, and a unanimous verdict is required for conviction.

In all the states, the qualifications of jurors are set forth in the statutes, as is likewise the mode of selecting the jury. Speaking generally, qualified jurors must be citizens (taxpayers in some states) of good repute and of fair intelligence, at least twenty-one years of age, and residents of the county. Certain classes of persons, particularly those engaged in public service, and persons over a certain age (sixty years in some states), are exempt from jury service.

As a general rule, a list of persons qualified to serve as jurors is kept by some public official. This list is revised from time to time. Some states have jury commissioners whose duty it is to prepare these lists. In other states, the lists are made up by various town and county officials. From this approved list (the names being often written on separate cards and placed in a box or wheel) a drawing is made by designated officials, at a certain time before each term of court. The names drawn are given to the sheriff who thereupon serves notice (the venire, at common law) upon each to appear in court, on a day certain, for the purpose of jury duty. Should the number of persons notified be insufficient to select a jury of twelve from, another list may be drawn as before, or, under the direction of the court,

[37] State v. Worden, 46 Conn. 349.

the sheriff may serve notice upon such persons (talesmen) as he may find, if qualified to serve, in order to secure the requisite number.

64. **Impanelling and challenging.**—The word impanel means, strictly, to enter or to enroll upon a panel. At common law, the panel was a piece of parchment upon which the sheriff wrote the names of the jurors summoned by him. This panel the sheriff delivered to the clerk of the court. In its modern use, panel is equivalent to the collective body of the jurors, and to impanel the jury means to call the jurors one by one to the jury-box as their names are read in court by the clerk. As they are called, it is the right of both the state and the defense to examine each, upon oath, or affirmation, as to their individual qualifications to serve.[38] If upon such examination, a summoned juror (venire-man) is found disqualified, he may be challenged for cause. Disqualification usually consists of a prejudice or bias from opinions already formed, of relationship to the person injured or the accused, of lack of qualifications required of all jurors, of favor for one side or the other, or of interest in the outcome of the trial. Any number of challenges may be taken for cause, the determination of the fact of disqualification being a matter of law for the court. In addition to challenges for cause, the state and the defense are allowed a certain number of peremptory challenges, the number fixed by statute varying in different states, and varying in different classes of crimes. A

[38] This examination is known, at common law, as the *voir-dire*, i. e., to see what he says.

peremptory challenge is an arbitrary challenge, resting entirely in the election of the challenger. For such challenges no reasons need be given.

Challenges, either for cause or peremptory, to individual jurors are known as challenges to the polls. In addition to such challenges there may be a challenge to the array, or a challenge to the entire body of the jurors. Such a challenge is grounded upon material errors or defects in selecting or summoning or returning the panel. In case the entire body has been returned contrary to the requirements of law, the court will dismiss the panel, and will order another set of jurymen to be returned. Mere immaterial irregularities, however, not prejudicial to the rights of the accused are not grounds for a challenge to the array.[39]

65. **Swearing the jury.**—Twelve qualified jurors being obtained, the jury is thereupon sworn by the clerk. The substance of the oath is that each one of the twelve "will well and truly try the pending cause between the state and the accused, and a true verdict give upon the evidence and the law." When the jury is sworn the trial begins. The accused is now in jeopardy.

[39] Rolland v. Com., 82 Pa. St. 306.

CHAPTER V.

THE TRIAL.

66. **Rights of the accused.**—In our system of jurisprudence there are certain rights that belong to any person on trial for a crime. The history of the development and recognition of these rights would carry us back beyond the days of King John and Magna Charta, but they are guarded at the present time by our various constitutions and statutes, both federal and state.

67. **Presence at trial.**—In addition to the right of trial by jury, already referred to,[40] the defendant in a criminal case has a right to defend in person. Not only does this right permit him to conduct his own defense, should he desire to do so, without the aid of counsel, but, of greater practical importance, it entitles him to be present at every step of his prosecution.[41] In some states, in the case of misdemeanors, he may be tried in his absence where he has waived his right to be present, or where he is represented by counsel. In all cases, however, where the presence of the accused cannot be waived, the record of the trial must show that he was present in person.

68. **Right to counsel.**—Another constitutional right of the accused is to be represented by counsel.

[40] See preceding chapter.

[41] State v. Smith, 44 Kan. 75, 24 Pac. 84.

This right did not exist at common law in the case of trials for felony, although it did exist as to trials for misdemeanors.[42] The court was supposed to represent the accused in felonies, and see that he had a fair trial. At the present time the right to be defended by counsel is guaranteed by every state, in felonies as well as misdemeanors.[43]

If the accused is unable to employ counsel, the court, in some states, must appoint or assign counsel to defend him. The court has the right to make the selection of counsel in such cases, but in some jurisdictions consults the accused as to his wishes in the matter. Unless the statute provides for compensation, counsel appointed by the court must serve without compensation. The defendant may, however, as already pointed out, decline counsel and may defend himself.

69. **Confronting witnesses.**—One of the most important rights secured to an accused person by constitutional provisions is that of being confronted by the witnesses against him. This means a right to see them face to face. This right, however, does not extend to a preliminary investigation before a coroner, grand jury, or magistrate, to determine whether one should be held to answer for a crime.[44]

The accused is permitted to waive his right to be confronted by the witnesses against him, and he may consent to admission of secondary evidence. The testimony of a deceased witness given on a

[42] 4 Blackstone, Commentaries, p. 355, note.

[43] In England, the common law rule as to felonies was not changed till 1836.

[44] 3 Greenleaf, Evidence, § 11.

former trial may be read in evidence, as it is considered that the accused has once met his accuser face to face.[45] Depositions, however, of witnesses in criminal cases cannot be taken without the consent of the accused. This does not apply to documentary evidence, and certified copies of such evidence may be admitted.

Many states require that the names of the witnesses for the state or people against the accused must be indorsed on the indictment. The purpose of such a requirement is to acquaint the accused with the witnesses against him, that he may be prepared to impeach them.

70. **Witness against himself.**—The defendant as a witness cannot be required to criminate himself. This is generally regarded as a constitutional right in all of the states. When a person is called to testify in a civil or criminal case, and he is questioned in regard to any matter where his testimony might tend to criminate him, he may decline to answer. The court decides whether it will tend to criminate him. One turning state's evidence waives the right, however, and must testify fully.

At the common law the accused could not testify in his own behalf. This was modified later so that the accused could make a statement but could not be sworn as a witness. Now the accused may be sworn if he wishes, but he cannot be called upon to testify against himself.

The accused may in some states[46] make a state-

[45] People v. Dowdigan, 67 Mich. 95, 38 N. W. 920.
[46] See Cochran v. State, 113 Ga. 736, 39 S. E. 337.

ment, to which the jury will give such credence as they see fit. In all states he may be called as a witness and give his testimony on oath. When he offers himself as a witness he is subject to the ordinary rules of cross-examination. This is not the case when he simply makes a statement. The jury are not allowed to draw unfavorable inferences from his failure to testify. And by statutory provision the prosecutor may not comment upon his failure so to do.

71. **Fair and impartial trial.**—An accused person is also entitled to a fair and impartial trial. This is another constitutional provision in many states. It is the duty of the trial judge to so conduct and control the course of the proceedings that this right shall be preserved.[47] The court is not permitted, for example, to prejudice the jury in any way, either for or against a witness or the accused.

The prosecuting attorney should not in his opening statement allege things for which he has no proof, or which would not be competent for him to prove in the case. Likewise, he should not be permitted to abuse or mislead witnesses, or to assert that he believes the defendant guilty, aside from the evidence in the case.

It is entirely within the discretion of the court to exclude all witnesses from the court room while they are not testifying, if either the defendant or the state so requests, or even upon the court's own motion. Moreover, an accused person's right to a public trial is not violated by excluding from the

[47] State v. Wilcox, 131 N. C. 707, 42 S. E. 536.

room, in the interest of public morals in certain cases, all persons not connected with the case.

72. **As to separate trial.**—When two or more persons are jointly indicted, the rule, at common law, is that in the discretion of the court they may be tried together, or separate trials may be directed for each one of the defendants.[48] By statute, however, in some states, the right to a separate trial, in cases of felony, is a privilege of jointly indicted defendants, and it is error to deny this right.

73. **Order of the trial.**—The order of the proceedings in the trial of a criminal case is subject to local statutes and practice. In general, however, the order is substantially the same in all states. In trials of felonies, at common law, the regular practice, after the jury is sworn, is, first, to give defendant into the charge of the jury. This is done by the clerk, who reads the indictment, or states its effect, and informs the jury that to this charge the prisoner has pleaded not guilty, and that it is now the jury's duty to inquire whether he is guilty of the felony with which he stands charged, or not guilty.

The subsequent order is generally as follows: the prosecutor opens the case for the state by giving an outline of it to the jury, and stating the substance of what the state will prove; the state then presents its evidence; thereupon, counsel for the defendant (although his opening statement is usually optional) outlines the nature of the defense, and briefly reviews the evidence that will be presented in behalf of the accused; the evidence for

[48] Emery v. State, 101 Wis. 627, 78 N. W. 145.

the defense is then presented; the state may, then, by way of rebuttal, offer further evidence; this rebuttal evidence may, in turn, be met with rebuttal by the defense; next follow the arguments of counsel, the state having the right, in most jurisdictions, to open and close the argument; thereupon, the court instructs the jury upon the law applicable to the case;[49] the jury now retire to the jury room to deliberate upon their verdict; the jury return to the court room and report the result of their deliberations; in case of a verdict of guilty, the jury may be polled; the jury are discharged.

74. **The evidence.**—The rules regulating the admissibility of evidence in criminal cases are substantially the same as in civil actions,[50] subject, however, to certain exceptions, the most important of which are the exclusion of depositions, already mentioned, and the admission, in cases of homicide, of dying declarations. For the consideration of these rules the reader is referred to the title EVIDENCE elsewhere in this work. Experiments and tests may, in the discretion of the court, be made in the presence of the jury. The accused is presumed to be innocent until his guilt is established, and he is also presumed to be sane and of sufficient capacity to be responsible for his acts. If the defense of alibi is set up, the burden of proof is, by the great weight of authority, still upon the state, since it is an essential part of its case to show that

[49] In some states, the instructions may precede the arguments of counsel. It is so, for example, in Kansas.

[50] Com. v. Abbott, 130 Mass. 472.

the accused was present at the commission of the crime.[51] The *corpus delicti* (the substance of the fault), or the fact that a crime has been committed, must be clearly shown by the state.[52] Circumstantial evidence is sufficient to convict, providing the jury are satisfied beyond a reasonable doubt, even in a capital offense. The accused may introduce evidence showing his good character, but, unless he does so, the state cannot offer testimony to show that his character is bad. The prosecution cannot show that the defendant has been guilty of other crimes entirely distinct from, and unconnected with, the crime with which he is charged, but for the purpose of proving particular intent, previous acts of the same kind may be proved.[53] Other crimes may also be shown for the purpose of showing motive.[54]

75. **Burden of proof—Reasonable doubt.**—The burden of proof is, by the great weight of authority, upon the prosecution at all times to show upon all the evidence and with reference to all the necessary elements of the crime, that the accused is guilty beyond a reasonable doubt. The burden of proof, moreover, does not shift.[55]

Reasonable doubt is a fair doubt growing out of the testimony in the case. As was said by Chief Justice Shaw, in the celebrated case of Prof. Webster, a reasonable doubt "is that state of the

[51] Waters v. People, 172 Ill. 367, 50 N. E. 148.

[52] Harris v. State, 28 Tex. App. 308, 12 S. W. 1102, 19 Am. St. Rep. 837, LEADING ILLUSTRATIVE CASES.

[53] State v. Jamison, 74 Iowa 613, 38 N. W. 509.

[54] Smith v. State, 17 Neb. 358, 22 N. W. 780.

[55] Baker v. State, 80 Wis. 416, 50 N. W. 518.

case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." It is a doubt based on reason and common sense, and is not a mere capricious or possible doubt.

The question is left to the reason of each individual juror, so that if one juror in the twelve entertains a reasonable doubt it should lead to acquittal or disagreement. Again, to establish guilt beyond a reasonable doubt, the circumstances proved must be inconsistent with any other theory than guilt, and if the jury can reconcile the facts with any theory of innocence, they must acquit the accused.

76. **Charging the jury.**—It is the duty of the judge presiding at the trial to instruct the jury as to the whole law of the case.[56] He should see that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what they are to decide. Where, in the opinion of the court, the evidence is not sufficient to sustain a conviction, he should direct an acquittal, and the usual procedure, in such a case, is by motion on the part of counsel for the defendant, asking the court to instruct the jury to find a verdict of not guilty. If, however, the evidence is sufficient to support a conviction, then such a requested instruction should be denied. Written

[56] Trimble v. Com., 78 Ky. 176. But see Baltimore, etc., Road v. State, 63 Md. 573, 1 Atl. 285.

requests for instructions may be presented to the court by both sides, and if such requested instructions are correct in law, and applicable to the facts of the case, they should be given. If, however, such requested instructions have already been given in substance by the court, it is not error to refuse to give them.[57]

The instructions by the court may be oral, unless the statute requires them to be in writing. In cases depending wholly upon circumstantial evidence, it is the duty of the court to charge the jury upon the nature and weight of such evidence, and when the state uses against the accused the testimony of accomplices, the jury should be instructed upon the weight of such evidence. The instructions must be based upon the evidence, and charges that are abstract and not applicable to the facts of the case are erroneous. The court should charge that the jury should be satisfied beyond a reasonable doubt as to the guilt of the accused, although, by general rule, it is not necessary to define what is a reasonable doubt.[58] In case the statutes provide for an instruction on reasonable doubt it is the safer plan, to avoid error, to follow the words of the statute.[59] Where the evidence in a case admitting of different degrees of the crime charged is such that the jury may convict of a lesser grade of the offense, the court should explain the difference between the various degrees, and in trials for murder the term "malice" should

[57] Coffin v. U. S., 162 U. S. 664, 16 Sup. Ct. 943.
[58] Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325.
[59] Jolly v. Com., 110 Ky. 190, 61 S. W. 49.

be defined to the jury, the omission to do so being reversible error.[60]

77. **Supervision and conduct of the jury.**—After the trial begins it is generally within the discretion of the court to permit the jury to separate, during adjournments, although the practice is regulated by statute in many states. But in all capital cases, and in all felonies in some states, it is required, in many jurisdictions, that they be kept together in charge of a sworn officer. When, however, they retire to deliberate upon their verdict they cannot, in most jurisdictions, separate until they have been discharged by the court.[61] The jury should at all times conduct themselves properly, since for material misconduct on their part a new trial may be necessary. In deliberating upon the verdict it was the old common law rule that they should be kept without food or drink or fire until they had reached an agreement. In modern times, however, they are provided with suitable and sufficient food.

It is common practice to permit the jury, upon retiring for deliberation, to take with them any paper or article received as evidence in the case. In some jurisdictions, however, this can be done only with the consent of counsel both for the state and the defense.[62] In case of disagreement among the jury as to any part of the testimony, or in case of a desire for further enlightenment as to the law, they may, in many states, under the guard of the officer

[60] Richardson v. State, 28 Tex. App. 216, 12 S. W. 870.

[61] See, however, State v. McNeil, 59 Kan. 599, 53 Pac. 876 (that court may permit separation, even after final submission, for a necessary purpose).

[62] So in New York. See Code Cr. Proc., § 425.

in charge of them, return to the court for further information.

78. **The verdict.**—The verdict is the decision of the jury, concurred in by all the members, and rendered in open court. When the jury is ready to report, they announce the fact to the officer in charge. He informs the court, which is supposed to be always open for the purpose of receiving a verdict, any hour of the day or night, including holidays and Sundays.[63] The local practice, or statutes, sometimes permit a sealed verdict to be handed to the clerk, during the hours of adjournment, the jury separating until the opening of the court, and then returning to acknowledge the sealed verdict. A verdict may be oral, although some states require that it be put in writing, and signed by the foreman.

The verdict is delivered by the foreman. The assent of all the jurors to a verdict pronounced by the foreman in their presence and hearing, is conclusively presumed.

Where the verdict delivered plainly amounts to an acquittal in its legal effect, as where it is "guilty of an assault, but in self-defense," the court should direct an acquittal; but if the verdict is expressed in doubtful terms, the court should explain to the jurors the points by which their verdict should be governed, and send them back to reconsider it.[64]

"The verdict in a criminal case is either general, on the whole charge, which the jury are at liberty to

[63] State v. Atkinson, 104 La. 570, 29 So. 279.

[64] For an illustration of a verdict accompanied with surplusage, see ex parte Burden, 92 Miss. 14, 45 So. 1, LEADING ILLUSTRATIVE CASES.

find in all cases, both upon the law and the facts of the case; or partial, as to a part of the charge, as where the jury convict the defendant on one or more counts of the indictment and acquit him of the residue; or special, where the facts of the case alone are found by the jury, the legal inference to be derived from them being referred to the court; whether, for instance, on the facts stated the crime is murder, manslaughter, or no crime at all."[65]

The court has the right, and in some cases is in duty bound, to require the jury to reconsider their verdict, and alter it. Also, the jury themselves may rectify their verdict after it has been delivered and before leaving their seats, and the verdict will stand as amended.

79. **Polling the jury.**—In some states it is the right of the defendant or of the state to have the jury polled. In other states, this procedure is in the discretion of the court. It consists in having the clerk call over the names of the jurymen one by one, each one being asked "Is this your verdict?" In case of any one of the twelve dissenting, the jury may be sent out for further consultation.[66]

[65] Heard, Criminal Pleading, p. 300.
[66] Winslow v. State, 76 Ala. 42.

CHAPTER VI.

STEPS AFTER THE TRIAL.

80. **Motion for new trial.**—If the accused is convicted, he may move for a new trial. A new trial is a rehearing of the same case, in the same court, before another jury, granted by the court on motion of the defense, upon proper grounds being shown for such an order.

Although, as a general principle, the verdict of the jury is conclusive, yet in case of serious misconduct on the part of the jury, or of errors of law in the progress of the trial, or of new and important evidence being discovered, great injustice may have resulted from the verdict as rendered. To prevent such a miscarriage of justice, and to enable the court to correct its own material errors, a new trial may, in the discretion of the court, be granted.

At common law, no new trial was granted in cases of felony or treason, but in cases of misdemeanor it was discretionary with the court either to grant or refuse a new trial.[67] Under modern practice, however, a new trial may be granted to a defendant in any criminal case, providing there is sufficient cause. The matter is generally controlled by constitutional and statutory provisions.

81. **Grounds for new trials.**—The grounds for

[67] 1 Chitty, Criminal Law, p. 657; People v. Comstock, 8 Wend. 549 (N. Y.).

which new trials may be granted are contained in the statutes of the particular state. Speaking generally, these various grounds may be summarized as follows: the admission of unauthorized evidence; newly discovered evidence; separation of the jury; misconduct of the jury; improper means of arriving at verdict; material misdirection of the jury; verdict contrary to law or evidence; disqualified jurors; misconduct of the judge; material errors in the conduct of the trial; misconduct of the prosecuting attorney; and misconduct of court officials. All of these grounds may not exist in all states, it should be understood, but most of them exist in all, and all of them exist in some.

82. **Necessity of motion.**—In many states, an appellate court cannot consider, on appeal, errors of law occurring at the trial unless they are assigned as error on a motion for a new trial.[68] The motion for a new trial must be made before judgment and, generally, before a motion in arrest of judgment.[69] Some cases hold, however, that a motion for a new trial is not waived by a motion in arrest of judgment.

The motion is made in writing. The court appoints a time for the hearing on the motion, and, as a rule, the granting or refusing of the motion is within the discretion of the trial court, not appealable except in case of an abuse of discretion.

83. **Arrest of judgment.**—In addition to a motion for a new trial, the defendant, in case of a

[68] See, for example, State v. Tuchman, 47 Kan. 726, 28 Pac. 1004.
[69] 1 Bishop, New Criminal Procedure, § 1268.

verdict of guilty, may move to arrest judgment. The grounds for this motion are based upon defects in the proceedings apparent upon the record, as that the grand jury finding the indictment had no jurisdiction, or that the indictment is insufficient in some material part.[70] Mere informal defects in the indictment or information are cured by the verdict, but substantial defects apparent on the record, in the indictment or elsewhere in the proceedings, or the omission of matter from the record that is required by law to be there, offer opportunity to arrest or stop the judgment or sentence.[71] If judgment is arrested, defendant may be tried again upon a new indictment, or upon the same indictment if the error complained of was not connected with it.[72]

84. **Sentence.**—In case no new trial is granted, nor judgment arrested, it is the duty of the court to impose sentence, or judgment. In cases of felony, the defendant must be present when sentence is pronounced. This is not absolutely necessary, however, in cases of misdemeanor. The statutes usually fix the penalty, giving, in most cases, a discretion to the court within certain limits. In some states the penalty may be determined by the jury, as, for example, in certain crimes, whether the punishment shall be death or imprisonment for life. In some states, also, the sentence may be indeterminate, that is, for not less than a certain period and not greater than a fixed maximum. In such cases

[70] State v. Doran, 99 Me. 329, 59 Atl. 440, LEADING ILLUSTRATIVE CASES.
[71] Com. v. McMahon, 133 Mass. 394.
[72] Curtis v. Com., 87 Va. 589, 13 S. E. 73. But see State v. Parish, 43 Wis. 395.

the duration of the imprisonment depends, as a rule, upon the good conduct of the prisoner during his confinement.

A sentence imposed by a court having no jurisdiction either over the subject matter or the person is absolutely void, and one restrained of his liberty by such a sentence has his remedy in habeas corpus.[73]

85. **Appellate proceedings.**—In all of our courts, both state and federal, there are possibilities of appellate proceedings after sentence is imposed. These proceedings, according to the jurisdiction, may be prosecuted by writ of error, writ of certiorari, or by appeal.

86. **Writ of error.**—A writ of error is a writ issued by a superior court to an inferior court, commanding the latter, because of some alleged error upon the record, to send the record to the superior court for review and for correction. Writ of error lies only after final judgment. In criminal cases writs of error, at common law, were grantable as of right only in misdemeanors. In felonies they were allowable only in the discretion of the court.[74] Writs of error are still used in many of our state courts, and in some jurisdictions appellate proceedings can be instituted only upon a judicial allowance. In the federal courts writs of error are used, and it is the only method by which a case can be carried from the court of last resort of a state to the Supreme Court of the United States.

[73] Ex parte Burden, 92 Miss. 14, 45 So. 1, LEADING ILLUSTRATIVE CASES.
[74] Haines v. People, 97 Ill. 166.

87. **Bills of exceptions.**—A writ of error orders the record to be sent to the higher court. The record, however, contains only those matters which are required by law to be entered thereon. It is a brief, concise statement of the proceedings in the case, and there are many things that take place in the trial of a case that are not a part of the record. Matters of evidence, for example, are not a part of the record, nor, at common law, the instructions of the court.

To get matters upon the record that are not regularly a part of it, bills of exceptions, or their statutory equivalents, are required. Bills of exceptions are formal and written statements of the exceptions taken by the defense during the trial. These statements, when found correct by the judge, are "allowed" by him, his allowance being certified by his signature. They then become a part of the record, and go up with it for appellate review.

88. **Certiorari.**—The writ of certiorari is a writ issued by a higher court of general jurisdiction and directed to a lower court, tribunal, or quasi-judicial body, commanding the proceedings in the case, or matter in hand, "to be certified"[75] and sent up with the papers to the higher court. This writ lies to review the proceedings of inferior tribunals whose procedure is not according to the course of the common law,[76] that is, whose procedure is special or statutory. Such a writ may be used in many jurisdictions for appellate purposes when no

[75] "Certiorari," in the Latin.
[76] State v. Bill, 35 N. C. 373.

other remedy exists.[77] It may be issued either before or after judgment.

89. **Appeals.**—Strictly speaking, the word "appeal" means a trial *de novo* (anew) in a higher court. In this sense it is used when "an appeal" is taken from an inferior court, as a police court or a justice court, to a higher court. In such appeals, the case is usually tried anew in the appellate court. In its broad sense, the word "appeal" means any proceeding in error by which the alleged errors committed in a trial court are reviewed in an appellate court. There is no second trial; only a hearing upon the errors assigned. Appeals are purely statutory, and many states provide for such statutory proceedings in error, and have abolished writs of error. In no two states, however, are the details of the procedure on appeal exactly alike. In many states appeals are matters of right; in some states an appeal must be prayed for, and an order allowing it entered by the court. In general, however, in a criminal case, due notice of the application for the appeal must be given by the defendant. The appeal must be taken within a certain time, and a transcript, that is, a copy of the record, containing therein the exceptions to the alleged errors made in the trial, must be filed in the appellate court within the time fixed by the statute.

90. **Federal courts.**—Writs of error regularly, and sometimes writs of certiorari, are used in the federal courts for appellate purposes. In order, however, to take a case from a state court to the

[77] People v. Murray, 89 Mich. 276, 50 N. W. 995.

Supreme Court of the United States, a writ of error must be used.[78] A criminal case can be appealed from the highest appellate court of a state to the Federal Supreme Court only when the final judgment of such state court denies some right, privilege, or immunity specially claimed by the accused, and which is secured to him by the Constitution of the United States. In other words, there can be an appeal only when a federal question is raised.

91. **Appeals in England.**—It may be of interest to add in conclusion that not until the year 1907 was there a right of appeal in criminal cases in England. In that year the Court of Criminal Appeal was constituted and writs of error were abolished.[79] A person convicted on an indictment may now appeal without leave, as a matter of right, on any ground involving only a question of law. On any other ground that appears to the court to be sufficient, or on a mixed question of law and fact, he may appeal with the consent of the court.

[78] Twitchell v. Com., 7 Wall. 321 (U. S.); Andrews v. Swartz, 156 U. S. 272.

[79] Crim. App. Act., 7 Edw. 7, c. 23, § 20.

CHAPTER VII.

FORMS OF INDICTMENTS.

Murder.

That A. B., late of ————————, in the County of ————————, laborer, on the 6th day of June, in the year of our Lord one thousand nine hundred and three, at ————————, in the County of ————————, did feloniously, wilfully, and of his (deliberately premeditated) malice aforethought, make an assault on one C. D., and a certain gun which then and there was loaded with gunpowder and one leaden bullet, and was by him the said A. B., had and held in both his hands, he the said A. B., did then and there feloniously, and of his malice aforethought, shoot off and discharge at and upon the said C. D., thereby, and by thus striking the said C. D., with the leaden bullet, inflicting on and in the left side of his head one mortal wound, of which said mortal wound the said C. D. then and there (instantly) died (or then continuously languished until, on, etc., he then died). And so the said A. B., did, in manner and form aforesaid, feloniously and of his (deliberately premeditated) malice aforethought, kill and murder the said C. D., on the said 6th day of June, in the County of ————————, aforesaid, against the peace and dignity of the people of the State of ————————.

Burglary.

Precedent in State v. Shores, 31 W. Va. 491.

"That on the fifteenth day of February, 1888, about the hour of ten o'clock in the night time of that day, Stape Hall, Bailey Hall, and J. W. Shores feloniously and burglariously did break and enter into the dwelling house of one L. Schereschewsky, situate in said county, with intent the goods and chattels of him, the said Schereschewsky, in the said dwelling house then and there being, then and there * * * to steal," etc.

Larceny.

Precedent in State v. Dewitt, 152 Mo. 76, 53 S. W. 429.

"The grand jurors for the state of Missouri, duly impaneled, charged, and sworn to inquire within and for the body of the County of Texas, and true presentment make, upon their oath present and charge that one Frank Dewitt and Rude Stark on the 7th day of June, in the year 1897, in the County of Texas, aforesaid, did then and there feloniously steal, take, and carry away two head of neat cattle, the personal property of one A. C. Street, against the peace and dignity of the state."

See also indictment in Roberts v. Reilly, LEADING ILLUSTRATIVE CASES.

Embezzlement.

Precedent in Lycan v. People, 107 Ill. 424.

"State of Illinois, } ss.
County of Peoria. }

Of the October term of the Peoria Circuit Court

in the year of our Lord one thousand eight hundred and eighty.

The grand jurors chosen, selected, and sworn, in and for the County of Peoria, in the name and by the authority of the people of the State of Illinois, upon their oaths present that Edward B. Lycan, late of said county, on the sixteenth day of July in the year of our Lord one thousand eight hundred and eighty, and in the County of Peoria, aforesaid, being then and there the agent of Ellen Wilkes, did then and there, by virtue of his said employment, have, receive, and take into his possession certain money to a large amount, to wit, to the amount of $600, and of the value of $600, of the property and moneys of said Ellen Wilkes, the said Lycan's said employer, and the said Lycan the said money then and there feloniously did embezzle and fraudulently convert to his own use, with intent then and there to steal the same, without the consent of the said Ellen Wilkes, the said Lycan's employer, whereby, by force of the statute in such case made and provided, the said Lycan is deemed to have committed the crime of larceny, and so the jurors, aforesaid, upon their oaths, aforesaid, do say that the said Lycan then and there, in manner aforesaid, the said money of the property and moneys of the said Ellen Wilkes, the said Lycan's employer, from the said Ellen Wilkes did then and there feloniously steal, take, and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the same people of the State of Illinois."

Forgery.

Precedent in State v. Greenwood, 76 Minn. 211.

"State of Minnesota v. Ernest L. Greenwood. Ernest L. Greenwood is accused by the grand jury of the County of Olmsted, in the State of Minnesota, by this indictment, of the crime of forgery in the second degree, committed as follows: The said Ernest L. Greenwood, on the eighteenth day of December, A. D. one thousand eight hundred and ninety-seven, at the City of Rochester, in the County of Olmsted, and State of Minnesota, with intent to defraud, did then and there falsely and feloniously forge a certain promissory note of the tenor following: $300.00. Dec. 14, 1897. On or before one year after date we promise to pay to the order of Edward J. Gimm three hundred dollars, with interest at seven per cent per annum, at ————, value received. E. L. Greenwood. E. E. Greenwood. No. ————. Due————, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Minnesota. Dated at the City of Rochester, in the County of Olmsted and State of Minnesota, this 21st day of June, A. D. one thousand eight hundred and ninety-eight. James Crawford, foreman of grand jury."

BIBLIOGRAPHY.

For valuable works on the subject of Criminal Procedure, the student is referred to *Bishop,* New Criminal Procedure, 2 vols.; *Archbold,* Criminal Practice; *Beale,* Criminal Pleading and Practice; *Clark,* Criminal Procedure; *Heard,* Criminal Pleading; *Hughes,* Criminal Law and Proceedings; *Bishop,* Directions and Forms.

LAW OF PERSONS
AND
DOMESTIC RELATIONS

BY
ELMER M. LIESSMANN, LL.B.*

INTRODUCTION.

1. **Scope and classification.**—The classification to be considered in the treatment of the subject will be confined to three general topics: 1. Parent and Child. 2. The Infant. 3. Husband and Wife. Under the first head will be considered the relations between parents and their children. In that connection the effect of adoption laws, which are purely statutory, and the status of bastards, will be touched upon. Under the second head will fall the rights of minors, those whose security in business dealings with the mature world it is the especial care of the government to conserve. Thirdly, much attention will be devoted to the rights and relations of husband and wife, both as between themselves and as to the outside world. In connection with this topic, the law of divorce will be explained as far as explanation is possible, for it should be borne in mind

* Of the Chicago Bar; Lecturer, Northwestern University Law School. Author: "Illinois Tax Laws and Decisions"; contributor to legal journals.

that originally there was no divorce except for adultery, and the present complex divorce situation in America is the result of statutes of which there exist as many assortments as there are states in the Union.

The topic of Master and Servant will be treated under the subjects of Torts and Agency; the topic of Guardian and Ward under the subject of Descent, Wills and Administration.

2. **Common law and statutory law.**—Before entering upon the subject it might be well to remark on the meaning with which "common law" and "statute" are used in this text. It can possibly be said that the subject of domestic relations is unique in that more statutes have been enacted affecting this branch of the law than any other one branch. Particularly is this true of the law concerning husband and wife, their individual rights and their relations to each other. In the absence of a statutory enactment, however, the common law prevails, and throughout this text repeated distinctions will be drawn between common law and statutory law.

Professor Walker's[1] statement of the distinction between the two is very good. He states that the body of the law may be divided into two great divisions, (1) written law, and (2) unwritten law. Of these divisions, written law may be said to comprise constitutions, which are solemn written declarations of the sovereign will of the people defining the forms and power of government; treaties, which are solemn written compacts entered into by independent nations to regulate their intercourse; and

[1] Walker, American Law (9th ed.), pp. 50-58.

statutes, which are laws duly enacted by the legislatures of the various states. The unwritten law may be said to comprise common law and equity. Common law is unwritten in the sense that it was not born in some written edict of the sovereign or some written statute of the state acting through the legislature, but its origin is found in customs or traditions, or collections of them, "commencing in immemorial times, acquiesced in by successive generations, and gradually enlarged and modified in the progress of civilization." True, it is now found for the most part recorded in writing, but the writings are mere expositions of it and not its creators. Thus Professor Walker gives as illustration the following: "We may suppose a question to have arisen in England, centuries ago, respecting which the written law contained no provision. Upon presenting this question to the judge, he must either let a wrong go unredressed, or make a law to meet the exigency. He chose the latter alternative; and in making up his decisions sought light from every available source. If a case exactly similar had before been decided, he would naturally adopt the decision then made. Or if an analogous case could be found, he would adopt its principles so far as they would apply. If neither of these, he would consult public policy and the abstract principles of material justice. * * * A succession of judges, during a long lapse of years, have contributed the results of their reason and learning to elaborate and perfect it." This illustration is not strictly correct, for the judge in the supposititious case does not make the law, but merely

expounds the law he found to exist in the form of customs and traditions or cases before decided.

"Thus," Professor Walker continues, "the common law, then slowly matured into a system in England, was introduced into this country by the first colonists together with the statutes by which it had then been modified, so far as applicable to their condition. This was at first a matter of necessity, and when the colonies became independent, the system, which in the meantime had been much improved under their own legislation, was retained from choice. * * * Where a question arises concerning which our written law is silent, we consult the reports, beginning with those of our own state. We pass thence to the other American reports, and finally to the English reports, searching back to the earliest times," meaning by "reports" the written decisions of judges in adjudicated law suits. When, therefore, reference is made to statute law and common law hereinafter, it is meant to differentiate between acts of the legislature on the one hand and law not promulgated by the legislature on the other.

PART I

PARENT AND CHILD

CHAPTER I.

PARENT'S RIGHTS AND DUTIES.

3. **History of the law relative to:**—It is the commonly accepted theory that our present-day social fabric is evolved from the primitive form of society, that is, the family. It is to be remembered that originally each family was the nucleus for a social organization. Of this organization, the eldest male member was the head or ruler; "patriarch," he was called. It would follow from this that the natural rules of parent and child were the original rules of law and served as the real foundation of our present-day structure of the law. It will be apparent from the context of this topic that the rules of parent and child are natural rules. Thus it will be seen that there was and is no direct legal obligation on the part of the father to support the child, which is enforcible by the child or by a third person on behalf of the child. The law considers that the natural bond is strong enough so that such direct legal liability is unnecessary. In the primitive form of social condition, the patriarch was in truth the parent. He it was to whom the various members of the family observed obedience; he it was to whom they gave

homage. He was the seat of the primitive government. Thus it was that when society changed its form of government, the government still retained its duty as the first parent of the children of the country, and thus it is that the state is now styled *parens patriæ* (father of the country).

4. **Parent's right to custody, control and discipline of child.**—At common law the custody of the child was properly in the father.[2] The law very early, however, perceived the danger of bestowing the care of infant children upon the male parent, so that a rule soon arose that a child of tender years properly went to the mother,[3] whereas one of maturer years went to the father.[4] The question then arose, what was the period of tender years, and it was considered that three years was a tender age, whereas five years was not. In this connection it must be remarked that the rule in equity was different. In equity the court's first inquiry was as to the best interests of the child, and if either of the parents was unfit to have the care of the child, the court would grant it to the other, and if both were unfit, the court would grant it to some third person.[5] The government, the state in this country, is *parens patriæ,* and is the first custodian of the child, even before the parents. Yet the courts will regard the natural rights of the parents whenever they can do so without violating their own duty to the child. Thus, as against the grandparents, the mother, if a

[2] Ex parte Skinner, 9 Moore 278 (Eng.).
[3] Sinclair v. Sinclair, 86 N. Y. Supp. 539.
[4] Sinclair v. Sinclair, 95 N. Y. Supp. 861.
[5] Ex parte Skinner, 9 Moore 278 (Eng.).

proper person and able to care for the child, will prevail, and that is true notwithstanding the grandparents are better able to provide.[6] In this case, the child, a boy, was required to go with the mother although it was his desire to remain with his grandparents. It seemed that the boy's best interest, possibly that best calculated to bring him up to sturdy manhood, was to help his mother, who needed a protector and later, indeed, a supporter. On the other hand, if it had been a girl, unless the mother showed herself able to give her the degree of care necessary, the child would go to the grandparents.[7] This does not mean that the person who can give the child the most luxury, shall be the guardian. The rights of the parent are not disregarded because somebody else can give more luxury. But where the mother is compelled to go to work during the day and leave the child alone and to its own resources, that, in the case of a female child, would be such disability to give proper care as would warrant the court to disregard her claim.

5. **Same subject—Right to chastise.**—It seems that both parents, father and mother, have the right to chastise their children moderately. This right to chastise, it seems, may be delegated. Thus a parent may give a teacher of the school that the child attends, the right to correct the child.[8]

6. **Same subject—Right of state to deprive parent of custody.**—While the state has the paramount

[6] Stapleton v. Poynter, 111 Ky. 264.
[7] Hussey v. Whiting, 145 Ind. 580.
[8] Rowe v. Rugg, 117 Iowa 606.

right over children, even to the exclusion of the parent, it is essential that the parent's right be respected to the extent that the parent's claim can be disregarded only where the parent is not fit. Taking a child away from the parent without giving the parent a chance to be heard amounts to a denial of due process of law and is unconstitutional.[9] However, statutes may provide that wilful abandonment shall deprive parents of their rights.[10]

7. **Parent's obligation to support child.**—As suggested above, this obligation is a moral one[11] in the sense that the child may not sue the parent to enforce this obligation, even where the father acted in the most unnatural manner to the extent, for example, of compelling a daughter to leave home.[12] It is considered that the moral obligation is itself strong enough and that the government ought not to dictate to parents how they shall feed, clothe and care for their children. Under statutes, however, and to prevent children neglected by parents from becoming charges upon the county or state, as the case may

[9] People v. McLain, 3 Ill. App. 27.

[10] Revised Statutes of Illinois, 1911, chap. 58, p. 1233. § 1. Hereafter when any child in this state, under the age of one year, shall be willfully abandoned by its parents, and shall be taken and cared for by any charitable institution in this state, incorporated or otherwise, such parents so abandoning said child shall thenceforth lose all their right, control and authority over said child, and said right, control and authority shall thereupon become vested in said institution.

§ 2. It shall be deemed a willful abandonment, for the purposes of this act, if any such child be left by its parents at any such charitable institution.

§ 3. In case of illegitimate children, or where the father of any legitimate child shall have willfully deserted his family for the space of one year, an abandonment by the mother of any such child shall be deemed an abandonment by its parents, according to the provisions of this act.

[11] Edwards v. Davis, 16 Johns. 281 (N. Y.).

[12] Huke v. Huke, 44 Mo. App. 308, LEADING ILLUSTRATIVE CASES.

be, parents may be compelled to support their children. In such cases, the mode of enforcing this liability is not to subject the parent to suit at the hands of the child, or of a tradesman supplying the child, but the courts will threaten the parent with imprisonment on failure to support.[13]

In general, then, the parent is not liable for necessaries which third persons, such as tradesmen, may supply to the child. To this rule there are some exceptions. Thus the circumstances might raise an agency in the child to pledge the parent's credit. This agency, however, must be proved, either express or implied, like any other agency between strangers.[14] Some jurisdictions consider that a third

[13] Revised Statutes of Illinois, 1911, chap. 107, p. 1732. § 1. Every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers or sisters of such poor person, if they, or either of them, be of sufficient ability: *Provided*, that when any persons become paupers from intemperance, or other bad conduct, they shall not be entitled to support from any relation, except parent or child.

§ 2. The children shall first be called on to support their parents, if there be children of sufficient ability; and if there be none of sufficient ability, the parents of such poor person shall next be called on if they be of sufficient ability; and if there be no parents or children of sufficient ability, the brothers and sisters of such poor person shall next be called on, if they be of sufficient ability; and if there be no brothers or sisters of sufficient ability, the grandchildren of such poor person shall next be called on, if they be of sufficient ability, and next the grandparents, if they be of sufficient ability: *Provided*, married females, while their husbands live, shall not be liable to contribute for the support of their poor relatives, except when they have separate property, or property in their own right, out of which such contributions can be made: *Provided, further*, that when the county in the first instance shall furnish support to such persons as are mentioned in section 1 of this act, that the county can sue the relatives mentioned in this section, in the manner provided in this act, for any sum or sums paid by the county for the support of such persons mentioned in section 1 of this act.

[14] Shelton v. Springett, 11 C. B. 452 (Eng.); McMillen v. Lee, 78 Ill. 443.

person who furnishes necessaries to a child compelled to leave the father's home for the father's fault, may recover from the father for their value.[15] The theory is, that the father is entitled to the earnings and services of the child, and in return is morally bound to care for him, in fact, is legally bound to the extent that he will be punished by the government under statute, if he fails to do so. While the child may not sue the father, yet a third person who supplies the child with what he requires and with what the parent has refused to give, thereby confers a benefit upon the father and so can recover from the father quasi-contractually.[16] Therefore, where the child is taken from the father on an order of court and given to the mother so that she becomes entitled to his earnings and services, the father cannot be subjected to any such suit,[17] though he may be paying alimony. Again, where the divorce gave the mother only custody with no right to the earnings and services, the father was liable to such proceeding, whereas, where no order was entered at all, no such liability arose in the absence of a showing that the father refused to support the child.[18] It appears that the mother, too, if living apart from the father for the father's fault, may furnish the child the necessaries and recover their value from the father.[19] Here the mother sues on the same theory as any third person in the same situation.

[15] Stanton v. Wilson, 3 Day 37 (Conn.).
[16] See subject, CONTRACTS; Ramsey v. Ramsey, 121 Ind. 215.
[17] Brown v. Smith, 19 R. I. 319.
[18] Ramsey v. Ramsey, 121 Ind. 215.
[19] Bazeley v. Forder, L. R. 3 Q. B. 559 (Eng.).

8. **Right to receive child's earnings.**—The law is that the infant's time and services belong to the father,[20] or where the father is dead, to the mother.[21] This right to the time and services of the child accrues in two ways, (a) where the child is working out, and (b) where the child is injured and the question of recovery in a personal injury action arises. In the former case, (a), the rule is that unless the child has been emancipated, the right of the father to the earnings of the child is absolute, and an employer acts at his peril in paying the money to the child. The father may even assign this right to the child's earnings.[22]

In the second case, (b), a distinction must be observed between injuries that are personal to the child, i. e., where the child has suffered physical harm and pain, has become crippled or disfigured; and those where the ability of the child to render service for the father, or the earning capacity, has been affected. As to those injuries that are personal to the child, the child may sue by his next friend. The next friend may be anyone. For the injury to the service-rendering capacity and earning capacity, the father or mother, as the case may be, must sue. Thus it is improper, unless the child is emancipated,[23] for the child to sue for loss of time or loss of earning capacity, and a judgment in favor of a child for personal injuries, that includes loss of time, or loss of service, is erroneous, and a de-

[20] Donk Bros. Coal Co. v. Retzloff, 229 Ill. 194.
[21] Osborn v. Allen, 26 N. J. L. 388.
[22] McGarr v. National & Providence Worsted Mills, 24 R. I. 447.
[23] See § 13.

fendant who pays such a judgment is still liable to the parent to the extent of the child's loss of time.[24] So too, in figuring the damages for an injury that incapacitates the injured child for doing the work he was accustomed to do, it is improper to include the consideration of loss of earning capacity up to the time of the infant's majority. So, again, the father may not recover for an injury that is strictly a personal one to the child, as where the child was wrongfully expelled from school.[25] The mortification, loss of education and deprivation of legal right, following such expulsion, is exclusively the child's cause of action.

9. **Right to damages arising from injury to the child.**—The general rule, then, is that the parent is entitled to damages on account of his loss of services, or his loss of the child's earnings, due to the injury inflicted upon the child because of the wrongful or negligent act of the defendant. The question at once arises, how are these damages to be computed? That the father is entitled to damages sufficient to replace such earnings as the child is prevented from earning on account of the injury, and had been earning prior to it, is clear where the father has not bargained away his right. The father is entitled, also, in cases where the child is permanently incapacitated, for damages to the extent that such incapacity will interfere with the ability of the child to earn, up to the period of majority.

[24] Slaughter v. Nashville, C. & St. L. Ry., 28 Ky. Law Rep. 665, 90 S. W. Rep. 243.

[25] Sorrels v. Matthews, 129 Ga. 319.

10. **Cases where the parent is not entitled to earnings or to damages for loss of services or earnings.**—There are some exceptions, however, to this general rule that the parent is entitled to the child's services and earnings, and to damages for injury to that right. At common law, it was considered that there was no recovery for a wrongful or negligent act resulting in instantaneous death. If the person remained alive for but a moment, a cause of action existed during that moment; but this cause of action died with the injured person, at common law. The same rule held as to the father's right to recover for injury to his right in the child. If the injury resulted in instantaneous death, he could recover nothing.[26] If the death was not instantaneous, the father might recover for expenses of care and medical attention up to the time of death, but not for anything thereafter, not even burial and funeral expenses.[27] This was the rule at common law. Statutes in many states have altered this, and a few states have by judicial decisions discarded the rule as inapplicable to modern times and conditions. In one state it was held that the right to recover, in case of death, for services the child might have rendered had he lived, depended upon whether the child was, at the time of the injury which resulted in the death, capable of any service.[28] If the child was a helpless infant, the theory was that there was nothing upon which to presume any loss of service; but

[26] Osborn v. Gillett, L. R. 8 Exch. 88 (Eng.).
[27] Trow v. Thomas, 70 Vt. 580.
[28] Amos v. Atlanta Ry. Co., 104 Ga. 809.

if the child was able to render any service, even that of doing little acts of usefulness about the home, that was sufficient. In the case cited, the child was, at the time, working out a fine in the penitentiary, and his parent was entitled, even after his death there, to recover for loss of service.

11. **Seduction.**—In the illustrations just reviewed, damages must have been proved, i. e., some concrete damage must have been shown by evidence. There is a class of cases where the law will presume damage, and that is in cases where the daughter has been seduced. The father is entitled to damages in a case like this upon the mere showing that the daughter was seduced by the defendant, and that is true notwithstanding she was working out at the time and had no intention to return home,[29] provided, of course, the daughter was a minor. Where, however, the infant daughter was apprenticed under apprenticeship bonds until she should become of age, all right to the earnings of the child had been parted with, and the father could maintain no action for seduction.[30] But the apprenticeship papers must be in due form to have this effect, for where they were not in due form, they operated only as an ordinary contract, and did not deprive the father of his action.[31] Where the daughter was of age at the time of the seduction, a recovery was not permitted the parent unless the daughter was living with the parent at the time and was, as a matter of actual fact, a

[29] Martin v. Payne, 9 Johns. 387 (N. Y.).
[30] Dain v. Wycoff, 7 N. Y. 191.
[31] Bolton v. Miller, 6 Ind. 262.

servant of the parent at the time.[32] It appears that in order for the parent to have this right, he must be in a position to command the service, even if he is not enjoying the service at the time, though what the right to command service is, is a matter of speculation.[33]

12. **Rights of mother and those in loco parentis.**—The mother, it seems, has the same right as the father to earnings and services of the child, where the father is dead.[34] What right, then, has one who is not father or mother, but merely a foster parent? The authorities are in conflict here. Some permit the foster parent to recover, where, in fact, there was at the time of the injury the relation of master and servant between him and the child,[35] while others deny a recovery altogether because the foster parent cannot compel service and, also, is under no obligation to support the child.[36] In the case last cited, even the right to recover the expense of nursing the child back to health was refused.

13. **Emancipation—Meaning and effect.**—It was suggested above that this right of the parent to recover would be barred if the parent had emancipated the child. The question then arises, what is emancipation? It is merely giving a minor his time, so that he can dispose of his services independently of his parents, and receive and dispose of his earnings

[32] Nickleson v. Stryker, 10 Johns. 115 (N. Y.).

[33] Thompson v. Ross, 5 Hurl. & N. 16 (Eng.); Beaudette v. Gagne, 87 Me. 534 (contra).

[34] Furman v. Van Sise, 56 N. Y. 435.

[35] Whitaker v. Warren, 60 N. H. 20.

[36] Kelly v. Ill. Cent. R. R. Co., 125 Ky. 1.

himself. An emancipation may be made in favor of a minor, without the minor giving any consideration for it, but in such cases, the parent may at any time revoke the emancipation.[37] Thus where a father gave his daughter her time and she went to work for defendant, and received her wages for the work she did for the defendant, the father might subsequently revoke the emancipation by demanding that the future wages be paid to himself,[38] though he could not hold the employer liable to pay to him what the employer had already paid to the daughter. It seems, however, that an emancipation may be irrevocable for a reasonable length of time. Thus where a father drives his son from home, and the son is compelled to hire out, he may enter into a binding contract for a reasonable length of time and for that time will be entitled to his earnings.[39] Again, where the child was permitted by the parent to receive his earnings and to enjoy them for himself, if he invested them, and accumulated a considerable sum of money, the parent could not, under guise of revoking the emancipation, claim this money. On the contrary, it would be considered a gift to the child, free from the power of the parent to take, just like any property that the child might inherit.[40] Emancipation may be implied where children are permitted to deal with their services and receive their earnings themselves.[41] Though the father has the right to

[37] Abbott v. Converse, 4 Allen 530 (Mass.).
[38] Ib.
[39] Smith v. Gilbert, 80 Ark. 525.
[40] Campbell v. Campbell, 11 N. J. Eq. 268.
[41] Geringer v. Heinlein, 3 Ohio Dec. 26.

revoke emancipation, this power is one that is purely personal and is not a property right that creditors can attach or avail themselves of.[42]

14. **Same subject—Marriage.**—The marriage of a minor child after the age of consent, is emancipation.[43] This is by operation of law. Where, on the other hand, the minor marries before he has arrived at the age of consent, i. e., where the statute provides that a child shall not marry without the parent's consent unless he has arrived at a certain age, there marriage is not emancipation, and an employer who paid such a minor his wages, was compelled to pay, again, to the father.[44]

15. **Same subject—Miscellaneous.**—A parent may be held to have emancipated his child in still another way. As explained above, when a minor wishes to recover for personal injuries sustained, he is not entitled to recover for actual loss of time, earnings or earning capacity up to the time of his majority, because his earnings belong to his parent, and the parent is the one entitled to sue for damages to the extent that the injury has effected the minor's loss of time, of earnings, or earning capacity; so that the parent and child, each, might maintain independent suits on account of the one personal injury to the child. The parent may, however, forego his right to damages on account of this injury, in favor of the child, and thereby empower the child to recover not only for his pain and suffering and disability after majority, but also for loss of time, earn-

[42] Geringer v. Heinlein, 3 Ohio Dec. 26.

[43] Aldrich v. Bennett, 63 N. H. 415.

[44] White v. Henry, 24 Me. 531, LEADING ILLUSTRATIVE CASES.

ings and earning capacity up to the period of majority. The question then occurs, what form should this emancipation take, to enable the infant thus to recover? Clearly, the parent might have emancipated the child by express words giving the child his earnings, if it was done prior to the period during which the loss of time, earnings and earning capacity occurred. Can the parent emancipate the child in order to enable him so to recover, after the period on account of which the damages are claimed? To permit the parent to do so would be permitting emancipation to relate backwards. This can be done. Doubtless, the parent could expressly assign the right to the child as an out-and-out gift. He may be held to have accomplished the same purpose by implication.

Thus, for example, where the complaint or declaration by which the infant sues, is broad enough to include a recovery for loss of earning capacity or earnings up to the time of majority, and the father acts as next friend, the father's act of presenting this complaint or declaration will be considered as waiving his own right to sue on account of his child's loss of earning capacity, and thereby work as emancipation, permitting the child to recover therefor.[45] So also where the parent as next friend testifies at the trial to support recovery by the child of such earnings,[46] or where he procures an instruction to be given permitting the child to recover for such,[47]

[45] Farrar v. Wheeler, 145 Fed. 482; Abeles v. Bransfield, 19 Kans. 16.
[46] Chesapeake & O. Ry. Co. v. Davis, 119 Ky. 641, 60 S. W. 14.
[47] American Car Co. v. Hill, 226 Ill. 227, 80 N. E. 784.

emancipation results. The mere commencement of the suit by the parent as next friend does not have this effect,[48] nor is there such emancipation where the father testifies in a suit brought with some other person as the next friend.[49]

[48] Slaughter v. Nashville, C. & St. L. Ry., 28 Ky. Law Rep. 665, 90 S. W. 243.

[49] Farrar v. Wheeler, 145 Fed. 482.

CHAPTER II.

SPECIAL RELATIONSHIPS—TORTS.

16. **Illegitimates.**—A child born out of lawful wedlock is an illegitimate. At common law the illegitimate child was of no parentage. He could not inherit from anybody, and none but his own legitimate children or children's legitimate children could inherit from him. This defect has been largely cured by statute. The statute must, however, expressly cure it; general statutes of descent and distribution are not sufficient for that purpose.[50] The bastard's father is liable for his support only by statute and to enforce such liability the statute must be strictly followed.[51] Under the statutes of most of the states, a bastard is legitimized by the subsequent marriage of his father and mother, though this was not true at common law.[52] In fact, the mother was the sole one recognized as the parent of such child. In such cases, where the statute provides for descent from the child to the mother and vice versa, the mother has the legal right to custody of such child.[53]

17. **Adoption.**—Adoption occurs where an adult person takes a minor into the relation of a child, and thereby acquires the rights and incurs the re-

[50] Cooley v. Dewey, 4 Pick. 93 (Mass.); 1 Stimson, Am. St., §§ 3151-3155.
[51] Simmons v. Bull, 21 Ala. 501; State v. Miller, 3 Pennewill 518 (Del.).
[52] Monson v. Palmer, 8 Allen 551 (Mass.); 1 Stimson, Am. St., § 6631.
[53] Barnardo v. McHugh, L. R. (1891) App. 388 (Eng.); Perry v. State, 113 Ga. 936; also see reprint of statutes at end of this chapter.

sponsibilities of a parent in respect to such minor. There is no adoption at common law. It follows that adoption is purely statutory, and the mode of effecting it must be carried out in strict compliance with the statute.[54]

18. **Same subject—Rights of adopted child.**—The adopted child inherits from his adopting parent just like a natural child, where the adopting parent dies intestate.[55] So, also, where a statute or the common law provides that a will shall be revoked[56] by birth of a child, the adoption of a child after the execution of a will operates to revoke the will.[57] But the right to inherit from the adopting parent does not give the child any right as to the adopting parent's relatives, either directly or by representation.[58] Some statutes operate to place an adopted child in the same position as a child by birth for the purpose of inheritance; some statutes go further. Under some statutes of the former type, an adopted child does not fall within the description of the term "child" or "bodily heirs," so as to take under a will made by the adopting parent in which reference is made to a "child," or to "bodily heirs."[59] Under the more comprehensive statutes, of course, the adopted child would fall within the designation of such terms.[60]

[54] Matter of Thorne's Est., 155 N. Y. 140.
[55] Burrage v. Briggs, 120 Mass. 103.
[56] See subject, WILLS.
[57] Hilpire v. Claude, 109 Iowa 159; Glascott v. Bragg, 111 Wis. 605.
[58] Keegan v. Geraghty, 101 Ill. 26; Sjoberg v. Field, 50 Misc. Rep. 420. (N. Y.); Moore v. Moore's Est., 35 Vt. 98; Meader v. Archer, 65 N. H. 214.
[59] Balch v. Johnson, 106 Tenn. 249; Woodcock's Appeal, 103 Me. 214.
[60] Sewall v. Roberts, 115 Mass. 262; Butterfield v. Sawyer, 187 Ill. 598.

19. **Step-children.**—Whenever one marries a person who has children by a former spouse, he or she assumes the relation of step-parent to such children, and the children are his or her step-children. So far as the moral obligation of parents to their children is concerned, that does not apply to the relation of step-parent to step-child. On the contrary a step-parent owes no duty to a step-child, under the law, other than that of a stranger.[61] Yet, just as in the case of an outsider, if a step-parent voluntarily assumes the care and support of a step-child he stands in loco parentis (place of the parent); and the presumption is that they deal with each other as parent and child.[62] In such cases the ordinary rules of parent and child will be held to apply to the extent only, however, that neither compensation for board is presumed on the one hand, nor for service on the other. But the rules apply no further than this, and there is no right of inheritance from or to the step-parent, nor is the step-parent entitled to sue for damages for loss of the step-child's earning capacity.

20. **Torts—Liability of parent and child to each other.**—The parent is under no liability to the child for tort. Thus a father who had committed acts of violence to his child's property or person could not be sued by the child in tort for damages,[63] though the parent is criminally liable for excessive violence to the child.[64] The reason for this is, that the child

[61] Freto v. Brown, 4 Mass. 675.
[62] Smith v. Rogers, 24 Kan. 140.
[63] Roller v. Roller, 37 Wash. 242.
[64] Hornbeck v. State, 16 Ind. App. 484.

cannot sue the parent for a tort, it being contra to the best public policy and good morals. The reverse is also true and a parent cannot sue the child for such injury.

21. **Same subject—Parent's liability to third persons for child's tort.**—The parent is no more liable to third persons for the torts which his child inflicts than he is liable for the wrongful acts of a total stranger.[65] However, the parent may have joined with the child in the injury, in which case he would be a joint tort-feasor, that is, wrongdoer, with the child.[66]

Of course, in cases where the child acts as the agent of the parent, the situation is that of any other agency or relationship of master and servant.[67] Or a parent may be guilty of maintaining a nuisance on his premises, where his boy, with or without his knowledge, threw stones over the fence into a public street, or raised an unearthly noise near the highway on the parent's property so as to frighten horses on the highway; in such cases the parent would be held liable for the proximate injuries resulting therefrom.[68]

[65] Wilson v. Garrard, 59 Ill. 51; Paulin v. Howser, 63 Ill. 312; Malmberg v. Bartos, 83 Ill. App. 481; Maher v. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228; Hagerty v. Powers, 66 Cal. 368, 5 Pac. 622, 56 Am. Rep. 101; Baker v. Morris, 33 Kan. 580, 7 Pac. 267; Smith v. Davenport, 45 Kan. 423, 25 Pac. 851, 11 L. R. A. 429, 23 Am. St. Rep. 737; Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336; Baker v. Haldeman, 24 Mo. 219, 69 Am. Dec. 430; Paul v. Hummel, 43 Mo. 119, 97 Am. Dec. 381.

[66] On this point analyze carefully Hoverson v. Noker, 60 Wis. 511, LEADING ILLUSTRATIVE CASES.

[67] Meers v. McDowell, 110 Ky. 926; compare Johnson v. Glidden, 11 S. D. 237.

[68] Taylor, J., in Hoverson v. Noker, 60 Wis. 511-513, LEADING ILLUSTRATIVE CASES.

LAW OF ILLEGITIMATES.

Illinois Revised Statutes, 1911, Chapter 17, Page 129.

§ 13. The reputed father of a bastard child shall not have the right to the custody or control of such child, if the mother is living and wishes to retain such custody and control, until after it shall have arrived at the age of ten years, unless, upon petition to the circuit court of the county in which the mother resides, it shall, on full hearing of the facts in the case, after notice to the mother, be made to appear to the judge of said court that said mother is not a suitable person to have the control and custody of such child.

§ 15. If the mother of any bastard child, and the reputed father, shall, at any time after its birth, intermarry, the said child shall, in all respects, be deemed and held legitimate, and the bond aforesaid be void.

Illinois Revised Statutes, 1911, Chapter 39, page 860.

§ 2. An illegitimate child shall be heir of its mother and any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person, and take, by descent, any estate which the parent would have taken, if living.

Second. The estate, real and personal, of an illegitimate person shall descend to and vest in the widow or surviving husband and children, as the estate of other persons in like cases.

Third. In case of the death of an illegitimate intestate leaving no child or descendant of a child, the whole estate, personal and real, shall descend to and absolutely vest in the widow or surviving husband.

Fourth. When there is no widow or surviving husband, and no child or descendant of a child, the

estate of such person shall descend to and vest in the mother and her children, and their descendants—one-half to the mother, and the other half to be equally divided between her children and their descendants, the descendants of a child taking the share of their deceased parent or ancestor.

Fifth. In case there is no heir as above provided, the estate of such person shall descend to and vest in the next of kin to the mother of such intestate, according to the rule of the civil law.

Sixth. When there are no heirs or kindred, the estate of such person shall escheat to the state, and not otherwise.

§ 3. An illegitimate child, whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate.

PART II

THE INFANT

CHAPTER III.

THE LAW RELATING TO THE PERIOD OF INFANCY AND TO MAJORITY.

22. **Who are children.**—At common law the age at which an infant, whether male or female, attained full majority, was fixed at twenty-one years. This rule is almost universal in regard to males, but in a number of states the age of majority as to females, at least for the purpose of determining the time when they shall be competent to make contracts and conveyances, has been changed to eighteen years. In those states where the female has become entitled to vote, the age is as a rule fixed at twenty-one years; but for purposes of bringing suit and defending suit without next friend or guardian *ad litem,* the age has been fixed, in a great many jurisdictions, at eighteen years.

23. **When an infant attains majority.**—The law says, for example, that an infant attains majority when he becomes twenty-one years of age. That is very simple and clear so far as it goes, but mark the difficulty. He becomes twenty-one years of age the moment he has rounded out his twenty-one years. That would be the instant after he passed the point

that marked the last moment of his twenty-one years. But the law does not take notice of seconds, or minutes, or hours, but only of days, and the law counts its days from midnight to midnight. Thus, if one were born on the first day of June, 1912, at one minute after twelve o'clock in the morning, being one minute after midnight of May 31st, he had not rounded out one complete year of his existence (actual computation) until one minute after twelve o'clock in the morning of June 1, 1913, and he will not have rounded out twenty-one full years of his existence until one minute after twelve o'clock, in the morning of June 1, 1933. But by law, as he was born one minute after midnight of May 31st, he cannot round out his full twenty-one years until the instant after midnight of June 1st, i. e., he will not have completed his twenty-first year until June 1st is gone and June 2d started, because the law takes no account of anything short of a day, and if a person was born in the morning of June 1st a minute after midnight of May 31st, he might as well have been born in the evening of June 1st a minute before midnight, twenty-three hours and fifty-eight minutes later in point of actual time. This would deprive the person of almost a whole day before becoming of age.

To avoid this, the common law arbitrarily said that he became of age the day before (counting from midnight to midnight) the day on which, as a matter of actual computation, twenty-one years from the minute, hour and day of his birth would end. This of course would in actual computation give him his

majority in some instances almost forty-eight hours before he really attained the full age of twenty-one. Thus, though one were born in the evening one minute before midnight on June 1, 1912, and would, by actual computation, not round out his full twenty-one years till the evening one minute before midnight of June 1, 1933, he, by force of this arbitrary rule of law, attains his majority in the morning of May 31, 1933, one minute after midnight of May 30.[69]

24. **Disabilities—Void and voidable contracts of infant considered.**—The theory of the law in making an infant's contracts voidable or void, as the case may be, is one of privilege or protection.[70] Of course, where the law says the act of the infant is merely voidable, there it may be ratified, but where the law says the act is void, there it cannot be ratified, but is absolutely a void act that cannot be made binding. The acts of the infant that are merely voidable and not void, and those that are absolutely void, will be explained and distinguished hereinafter. Suffice it at this point to remark that the effect of the distinction is most apparent where it is sought to base a new contract upon a consideration paid or an obligation sustained in connection with a voidable or a void act of an infant. If that act is voidable, the contract is founded upon that kind of a moral consideration as to make it binding, but where that act is void the subsequent contract founded thereon fails for lack of consideration.

[69] State v. Clark, 3 Harr. 557 (Del.), LEADING ILLUSTRATIVE CASES.
[70] Anonymous, 1 Salk. 44 (Eng.); 22 Cyc. 513; see subject, CONTRACTS.

CHAPTER IV.

INFANT'S CONTRACTS AND CONVEYANCES.

Division I.—Where the Adult Takes the Initiative.

25. **In general.**—It is commonly said that an infant's contracts or conveyances are voidable. By this is meant that the contract or conveyance is invalid unless ratified by the infant at majority. This stern rule, while possibly proper in very early times, has been so greatly modified that it is necessary to consider the question carefully in its various aspects under the law as it now exists.

Cases involving the validity of an infant's contracts and conveyances may be classed in two general divisions: (a) where an adult person takes the initiative, as where he starts litigation against an infant; or (b) where the infant takes the initiative, i. e., starts some proceeding against the adult.

26. **Where the adult takes the initiative—At common law.**—At common law an infant had the right to disaffirm all contracts except those for necessaries. The effect of such disaffirmances, however, was to revest in the seller the title to the goods which under the contract had been sold to the infant, and the seller might then reclaim the goods wherever he could find them, even if the infant had sold them to an innocent purchaser who paid full value for them to the infant. Of course,

if the goods were consumed, the seller was deprived.[71] Gradually the strictness of this rule was modified. It was considered by the courts that the infant's contract might become binding because of (a) estoppel, or (b) ratification; and exceptions to the rule sprang up in favor of certain kinds of contracts.

27. **Estoppel—Essentials necessary to constitute.**—It should be borne in mind that the rule permitting an infant to disaffirm his contracts and acts of conveyance is a salutary one for the infant and that it is founded not on a legal accident or quibble, but on the sound consideration of public policy looking to the protection of the infant. It is important, therefore, to scrutinize carefully, all alleged exceptions to the rule with a view to determining whether the exception deprives the infant of the protecting mantle which it is the express intention of the law to cast about him.

The theory of estoppel is based upon distinct legal grounds. There must be a representation by the person who is to be estopped; that representation must be made to the one who seeks to avail himself of the estoppel—with the intention that the person act upon it or with knowledge that he would; it must appear that the person so acting upon the representation did so *bona fide,* believing it to be true, and in so believing acted as a reasonable person; it must appear that the representation was false and that the person thus relying upon the representation sustained injury thereby. In order

[71] Wallace v. Leroy, 57 W. Va. 263, LEADING ILLUSTRATIVE CASES.

to invoke any principle of estoppel, these elements must coexist, and the case of the infant is no exception.

28. **Same subject—Misrepresentation as affecting the infant's right to disaffirm.**—The rule of estoppel, however, binds only the adult. Misrepresentation does not, as a general rule, deprive the infant of his right to disaffirm his contract and to set up such disaffirmance in defense of any proceeding that might be brought against him on account of the contract to secure which the representation was made.[72] Two cases apparently set up a contrary rule. They were both cases in equity. In one of these[73] the father of the infant mortgaged the infant's real estate and the infant stood by during the transaction, well knowing that the father misrepresented the real ownership of the property, without making known his rights; on the contrary, he even acted as the father's agent in procuring the mortgage. In the other case[74] the infant positively represented that he was of age, when, as a matter of fact, he was not, in order to procure a loan on his bond. In both cases the infant was denied the right to disaffirm so as to defeat action upon the obligation. One important distinction between the cases must be pointed out. It will be observed from what follows under the subject of fraud, that the test of whether an infant is liable for his fraud or not lies in whether his fraud is part of any con-

[72] Merriam v. Cunningham, 11 Cush. 40 (Mass.).
[73] Watts v. Cresswell, 9 Vin. Abr. 415 (Eng.).
[74] Ex parte Unity Joint, etc., Ass'n, 3 DeGex & J. 63 (Eng.).

tract he had made or not. So of the two cases above considered, in the former case the act of the infant in standing by and permitting the mortgagee to invest his money relying upon the father's wrongful representation was in no wise connected with any contract the infant had made. In the latter case the infant's act was instrumental in procuring the infant's own contract. However, to enforce the mortgage in the former case would virtually amount to making a contract or conveyance for the infant by act of court, though the infant himself had made none himself, and to that extent the principle involved is the same. Thus, at law, such a transaction, whether that of the former or the latter case, was unenforcible; but in equity, where the act of the infant was flagrant and the infant himself had at the time of commission of the act attained the years of discretion, where he was at the threshold of legal majority and apparently well able to look after his affairs, such transactions have been enforced. It might not be out of place at this point to explain what is meant in this article by the terms "in equity" and "at law."

The theory of the old law was that if one sustained an injury, the wrongdoer must be made to pay damages to the injured person. Following out this general idea, under the old English system the aggrieved person had his choice of one of various established writs which he might sue out against the wrongdoer. If none of the writs covered his case, he would select the writ that most nearly did so. Oftentimes, however, the suitor found none of the

writs at all suitable, so that he must go without relief if restricted to his remedy in these courts of law, or sometimes his relief called for something besides damages, as where someone had withheld property of his that was an heirloom and had a priceless value. "When, therefore, the law furnished no remedy, or only an inadequate one, or when its vigorous enforcement would work positive injustice, the party thus aggrieved, assuming the attitude of a suppliant, petitioned to the king in person, as the fountain of justice, for relief. But it soon became inconvenient for the king to give personal attention to these petitions, and he referred them to an officer of his household, called a chancellor. The office of chancellor, nominally derived from the Roman Empire, was at first purely ecclesiastical. The chancellor was the king's spiritual adviser, or conscience-keeper, and had the custody of the great seal. Being, of course, distinguished for his learning and probity, it was natural that he should be thus selected by the king as the dispenser of his justice and, accordingly, petitions were now addressed to him in the first instance. * * * Being at first without precedents, he acted according to his own ideas of natural justice, doing what he thought conscientiously right."[75]

However, at law, in England, even a positive misrepresentation by the infant did not estop him to disaffirm his act and set up such disaffirmance as a defense.[76]

[75] Walker, American Law (9th ed.), pp. 55-57.
[76] Bartlett v. Wells, 1 Best & S. 836 (Eng.).

The American equity courts have been more liberal than the English courts. In America, the infant is not estopped to set up a disaffirmance as a defense, even in the case of a misrepresentation.[77] In the case cited the infant gave a mortgage on property for money which went into the property in the form of filling for timber lots. This money was not paid to the infant, but was paid directly to those who had improved the property. It was considered by the court that the infant could not return the consideration as he did not have it apart from the real estate, and so he was permitted to disaffirm the mortgage without returning anything. The rule in such cases is, that where, by a requirement as a condition precedent to the right of the infant to disaffirm the mortgage that he return what he received, he would be compelled to affirm the contract or surrender the whole property, the consideration being merged into his property, the court will consider that he no longer has the consideration and consider his situation as being the same as if he had spent the money for articles that he consumed. This theory is well illustrated in cases of mechanics' liens where the contract for building was made during the infancy of the owner. It cannot be said that the infant has the consideration in his hand, as it has become merged in the real estate; and to force him to return it as a condition to the right to disaffirm the contract on which the lien was based, would force him to affirm the contract, or give up his property; in fact would really deprive him of

[77] New York Bldg. Loan Banking Co. v. Fisher, 48 N. Y. Supp. 152.

all election or choice in the matter. This, of course, would defeat the purpose of the law.

29. **Ratification—Only made after majority.**—An infant's contract is binding where the infant has ratified his contract. Once he has ratified the contract it is no longer voidable but is absolutely binding. This power of ratification, however, may be exercised only after majority. Therefore it must be considered only as of the time after the infant has attained his majority.

30. **Same subject—What constitutes ratification.**—Ratification occurs when an infant, on attaining majority, expressly affirms the contract he made during his minority. In order to constitute ratification it must appear that there was a direct promise by the infant to abide by his contract. Mere acknowledgment of the obligation is insufficient.[78] Thus, where one admits that he owes a debt

[78] Proctor v. Sears, 4 Allen 95 (Mass.). "Such ratification [by an infant after he comes of age] may be proved in divers ways; but it cannot be inferred from a mere acknowledgment of debt, as in the case of the statute of limitations. A promise to pay, is evidence of a ratification; so is a direct confirmation, though not in words amounting to a direct promise: as, if the party should say, after coming of age, 'I do ratify and confirm,' or, 'do agree to pay the debt.'" Per Parker, C. J., in Thompson v. Lay, 4 Pick. 48, 49 (Mass.), 16 Am. Dec. 325 (1826).

Per Upham, J., in Hale v. Gerrish, 8 N. H. 374, 376 (1836): "The rule in this case is different from that where the statute of limitations is pleaded. An acknowledgment of a subsisting debt, where a claim has been barred by the statute of limitations, furnishes evidence, unless explained or qualified, from which a new promise may be implied; but the promise of an infant cannot be revived, so as to sustain an action, unless there be an express confirmation or ratification, after he comes of age. This ratification must either be a direct promise, as by saying, 'I ratify and confirm,' or, 'I agree to pay the debt,' or by positive acts of the infant after he has been of age a reasonable time, in favor of his contract, which are of a character to constitute as perfect evidence of a ratification as an express and unequivocal promise."

and promises to pay it when he can, even if the statement is made after majority, that is not enough.

However, a ratification may be conditional, or may be framed in the alternative, or may be so expressed as to take effect in the future. Thus, where the infant, upon majority, promised that at the end of six weeks he would come and work for the creditor and thus cancel the debt, or would pay it, it was considered that this ratification was absolute at the end of the six weeks, and further that, if the debtor did not come to work at the end of six weeks and thus signify his election to work off the debt, it was proper to conclude that he thereby

Per Taylor, C. J., in Alexander v. Hutcheson, 9 N. C. 535, 537 (1823): "The distinction established between such an act as shall deprive the defendant of the benefit of the statute of limitations, and such a one as shall destroy the defense of infancy, is founded in good sense and ought to be maintained. In the first case there was a legal obligation to pay, arising from the original assumpsit, against which obligation the length of time operates as a bar; and a mere admission that the debt is not paid shows that the presumption, on which the statute is founded, fails in its application to the case. But, in the case of an infant, the law regards him as positively incapable of contracting a legal obligation, except for necessaries, and therefore aims to prevent his being imposed upon by persons of more experience. Whether an infant be under a moral obligation to pay a debt must depend on the circumstances under which the contract was made; and, if it can be clearly collected from them that advantage has been taken of his inexperience for the purpose of imposing on him, he may very justly shelter himself under his privilege. But supposing the contract to have been equitable, and a moral obligation thus created, the mere acknowledgment of it can have no legal effect; for such an obligation can, at the utmost, only amount to a consideration for an actual promise. Therefore, I have no hesitation in saying, that a new trial ought to be awarded."

It follows, from the fact that a mere acknowledgment of the debt is not enough to preclude the infant from setting up the defense of infancy, that a payment of interest or part payment of the principal after the infant comes of age is not. Thrupp v. Fielder, 2 Esp. 628 (Eng.); Catlin v. Haddox, 49 Conn. 492, 44 Am. Rep. 249 (1882); Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28 (1812); Sayles v. Christie, 187 Ill. 420, 58 N. E. 480 (1900). Clearly the promise of the infant to a third person is not sufficient. Hoit v. Underhill, 9 N. H. 436, 32 Am. Dec. 380 (1838).

elected to pay in money instead of in work, and an action could be enforced against the debtor.[79] Once there is a ratification, it is binding, and it is no excuse for the debtor to say that he did not know that under the law he could have disaffirmed.[80] Ignorance of the law is no excuse.

It seems that a ratification will not help a suit if it was started before the ratification.[81] In the case just cited, the suit was for goods delivered. The infant had consumed the goods, and after majority on non-payment the creditor sued the debtor. Thereafter the infant ratified the contract, but the ratification did not sustain the proceeding as it could not relate back to the time of commencing the suit, for the obligation of the infant is not considered a liability until ratification. Thus, a conveyance after majority by one who had incurred numerous liabilities during his minority, could not be a conveyance in fraud of creditors until ratification.[82] One case, however, distinguishes between an executed transaction and one not executed, holding that where the transaction was an executed one, the burden was upon the infant to disaffirm, and that unless and until the contract was expressly disaffirmed, the contract was binding; but that where the contract was not an executed one, it was inoperative and not binding until ratification.[83] It

[79] Edgerly v. Shaw, 25 N. H. 514.

[80] Merriam v. Wilkins, 6 N. H. 432.

[81] Anderson v. Soward, 44 Ohio St. 325.

[82] Edmunds v. Mister, 58 Miss. 765. Note that at common law an infant had an indefinite time after majority to disaffirm, but see infra.

[83] Boyden v. Boyden, 9 Met. 519 (Mass.), LEADING ILLUSTRATIVE CASES.

should be borne in mind that only those cases are now being discussed where the adult is the one suing and the question is whether the infant can after majority disaffirm for the express purpose of setting up such disaffirmance to defeat the suit. Suppose that after making the contract and enjoying the benefit thereof, the infant after majority conveys all of his property to a third person. Can such a conveyance be assailed as in fraud of creditors? The answer depends upon whether the infant's contract, under which the creditor claims who seeks to set aside the conveyance, is a binding obligation of the infant until he actually disaffirms it, or whether it is invalid and fruitless until the infant actually ratifies it. The argument is that in the former situation there are creditors at the time of the conveyance, assuming that no disaffirmance was made prior thereto, while in the latter situation there are no creditors, so that the conveyance could not be in fraud of any, there being none.

When, then, is a contract of the infant executed and when non-executed? If after majority the infant still has the consideration or the proceeds of the contract that he received, the contract is an executed one, but if he has consumed or enjoyed the proceeds or consideration and no longer has them, his contract is a non-executed one. Thus, a mortgage was held an executed contract where it was given to secure the purchase price of land which the infant retained after majority;[84] but where the mortgage was not to secure the price of land, but

[84] Callis v. Day, 38 Wis. 643.

merely to secure the value of improvements made upon land, there, since the infant could not reject the improvements without also giving up his land, his retention of the land did not amount to a ratification of the mortgage for the improvements, because he had to take the improvements with his land.[85] This subject will be treated again hereinafter.

31. **Necessaries.** — The general rule of non-enforcibility, as we have seen, expressly excepted necessaries. The question then arises—what are necessaries? The question of whether articles come within the class of necessaries or not, does not even arise until the infant has enjoyed the articles or the subject matter. Thus, conceding that a course of stenography was a necessary, merely making a contract to take it was not enough to bind the infant. Even if a necessary, he was not bound like an adult until he had enjoyed the course.[86] The reason for that is that the liability of the infant upon a contract for necessaries is for the reasonable value of what he received, and before he took the course, it is plain that he did not receive anything.

There is also no recovery on a promissory note of an infant even if for necessaries that the infant has enjoyed.[87] The reason for that is that, were a liability on a negotiable instrument made by an infant to be allowed, it would affect the negotiability of paper, thus injecting confusion into the law. Some

[85] Compare Thurston v. Nottingham Permanent Ben. Bldg. Soc., 1 Ch. 1 (Eng.).

[86] Mauldin v. Southern Shorthand & Business Univ., 3 Ga. App. 800.

[87] McCrillis v. How, 3 N. H. 348, LEADING ILLUSTRATIVE CASES.

cases, however, permit recovery on the note while it remains in the hands of the original payee.[88]

32. **Same subject—When articles are necessaries.**—Apparently it is not found sufficient that the articles belong to the class of necessaries, but it must appear that they were actually necessary.[89] When, then, are articles actually necessary?

It seems that the fact that an infant receives an income sufficient for his support, does not render voidable contracts for goods or articles that fall within the class of necessaries.[90] In other words, the fact that he has such an income does not confine him to a cash basis, but he may still get goods on credit and be bound absolutely to pay for them where, without the allowance, he would be liable, as where he was supplied with needed clothing. However, if it appear that the infant is amply supplied with money, and a tradesman or other adult furnishes him with articles of the class of necessaries, on credit, in order for the adult to recover, he must show that although the infant was plentifully supplied with money, he was not supplied with the necessaries.[91]

Where the child lives with the parent, and the parent decently provides for the child, he cannot bind himself to a stranger even for what might otherwise be considered necessaries.[92] So also where a child leaves home without the parent's

[88] DuBose v. Wheddon, 4 McCord 221 (S. C.).
[89] Johnstone v. Marks, L. R., 19 Q. B. D. 509 (Eng.).
[90] Burghart v. Hall, 4 Mees. & W. 727 (Eng.).
[91] Nicholson v. Wilborn et al., 13 Ga. 467.
[92] Bainbridge v. Pickering, 2 Wm. Bl. 1325.

consent, unless it appears that the father refused or was unable to provide for him at home, he cannot render himself liable to a third person for articles of the class of necessaries, and the burden of proving failure or inability of the father to provide rests on the third person thus furnishing the necessaries.[93]

As to what is of the class of necessaries, depends upon the station of life of the infant. Thus, the test would probably be: What is common and customary for his associates in the same walk of life, to have and enjoy? A millionaire, doubtless, would require an automobile, or expensive blooded horses, a yacht and other possessions of luxury which one of a lesser station in life would not require, and it is submitted that such would be necessaries. Thus it has been held that a common school education was a necessary, whereas a college education was not;[94] a railroad pass to visit home was not a

[93] Goodman v. Alexander, 28 App. Div. 227 (N. Y.).

[94] Middlebury College v. Chandler, 16 Vt. 683. It has been held that a bridal outfit, including a chamber set, was a necessary. Jordon v. Coffield, 70 N. C. 110; Sams v. Stockton & Curtis, 14 B. Mon. 232 (Ky.). Also that a telegram sent by the infant to his parents was a necessary. Western Union Telegraph Co. v. Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525.

Where the minor has no guardian, his contract with an attorney for services in securing the minor's estate or claim has usually been regarded as a contract for a necessary. Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151; Eperson v. Nugent, 57 Miss. 45, 34 Am. Rep. 434; Crafts v. Carr, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721; Hanlon v. Wheeler (Tex. Civ. App.), 45 S. W. 821.

But see Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. 176. On the general subject of liability of infants for the services of attorneys at law, see 96 Am. St. Rep. 731-735.

Per Beck, J., in Mauldin v. Southern Shorthand & Business University, 126 Ga. 680, 682-683, 55 S. E. 922, 923: "But there are many branches of learning in which instruction might be highly useful and advantageous

necessary.[95] So also repairs on real estate were not held necessaries. The theory is, that articles, in order to belong to the class of necessaries, must be conventional necessities. Therefore, when the repairs are to real estate, even if the real estate is used by the infant as a home, that is not enough to constitute a necessary. It must be something to satisfy his personal needs, as for wear and consumption and transitory enjoyment; but where it operates to the aggrandizement of the infant's property, such as the improvement of real estate, it falls out of the class of necessaries. The point that the repairs are for the purpose of the infant living on the property does not signify, for he may seek lodgings elsewhere, if his own property is not in condition to live on; lodging falling within the class of necessaries.

The question then occurs, can money ever be a necessary within the definition of this term so that a loan of money to the infant might absolutely bind him? The answer to that must be in the negative, and that is true notwithstanding the infant turned

which are not included either in a college or professional education (which most authorities hold not to be a necessary), nor in a common school education (which according to nearly all of the authorities is a necessary); and in those branches of learning, in most cases, it will be found that whether instruction is a necessary or not is a question depending upon the facts and circumstances of the particular case which go to show the state, degree, and condition of life in which the infant is, the validity of whose contract may be under consideration. And such we consider the science or art of stenography. Whether a course in that branch of learning would be a necessary to a young lady seventeen years of age would depend entirely upon that particular infant's condition in life, and the particular sphere in society or calling in life which her previous education and attainments had prepared and fitted her to occupy or fill."

[95] Penna. Co. v. Purvis, 128 Ill. App. 367.

right around and bought necessaries with it.[96] In the case cited the infant borrowed money on his note, laying it out for necessaries. But where the person furnishing the money himself invests it in necessaries, or instead of paying it to the infant sends someone to see that it is applied to the purchase of necessaries, the infant is liable.[97] In equity, however, the infant is liable even where the lender pays him the money.[98]

33. **Miscellaneous.**—There are some other exceptions to the rule of non-enforcibility. In some instances under the English rule an infant is absolutely bound where he has enjoyed the consideration. This is true of infants' leases. An infant must, in England, reject the leasehold before the rent day, otherwise he must pay the rent due on that day.[99] The lease, however, is voidable at any time, except that, to avoid paying the rent for the period, the infant must reject the leasehold by some unequivocal act signifying such intention, before rent day.[1] That rule obtained even where the infant had the leasehold thrust upon him, as where he inherited it as heir.[2] It must be noted, however, that this is strictly the English rule and is very consistently followed in that jurisdiction. Possibly the peculiar situation of the landlord who receives a tenant onto his premises has something to do with

[96] Darby v. Boucher, 1 Salk. 279 (Eng.).
[97] Randall v. Sweet, 1 Denio 460 (N. Y.).
[98] Marlowe v. Pitfield, 1 P. Wms. 558 (Eng.).
[99] Ketsey's Case, Cro. Jac. 320 (Eng.).
[1] Blake v. Concannon, 4 Ir. C. L. 323 (Irish).
[2] Kelley v. Coote, 5 Ir. C. L. 469 (Irish).

the rule, for the tenant is, as a rule, in the position where he has the landlord at a disadvantage, anyway. Thus, in our own country it has been held that an inkeeper could obtain a judgment against an infant for the price of the infant's lodging where that was not a necessary, because the law made it compulsory for him to receive into his inn as guests all people who applied and who were not of bad character and repute.[3]

34. **Same subject—Infant's contract of marriage.**—At common law the age of consent to marriage was fixed at fourteen in males and twelve in females. A marriage contract after the parties had reached the age of consent was valid and binding between them. Where both parties to the marriage were over seven and one or both under the age of consent, the marriage was subject to be avoided by either when both reached the age of consent, rather, perhaps when either reached the age of consent and until both reached the age of consent. Unless a statute clearly requires the contrary, the marriage before the age of consent is reached is valid till avoided. Living together as man and wife after both reach the age of consent will constitute a ratification of the marriage, and deprive each of the power to avoid it. When either party to a marriage is under seven, the marriage is said to be a mere nullity.[4] This is because at that age there is in theory of law an utter lack of capacity to enter into the relation.

[3] Watson v. Cross, 2 Duv. 147 (Ky.).

[4] Bishop, Marriage, Divorce and Separation, §§ 568, 571, 573, 575; State v. Lowell, 78 Minn. 166; Koonce v. Wallace, 52 N. C. 194.

Division II.—Where the Infant Takes the Initiative.

35. **Enforcibility against adult.**—Having now considered the right of the adult to enforce the contract against the infant, what is the right of the infant to insist upon a performance of the contract by the adult, he, the infant, himself being ready to perform according to the tenor of the contract?

36. **Same subject—Before majority.**—The rule is that an infant cannot before majority affirm a contract, for the reason that his affirmance would be no better act than his original contract. Whether he can disaffirm his contract will be considered a little later. If, then, he cannot affirm his contract during minority, he cannot require the adult to perform during his, the infant's, minority as he, the infant, might, after majority, disaffirm, and we would then have a case where the law compels an adult, who was fortunate enough to discover before he passed over any consideration that he was dealing with a minor and then refused to perform, nevertheless to turn goods or money over to the minor at the risk of losing all right of compensation by the infant's disaffirmance after majority. That was seen in a case where the infant filed a bill of specific performance of a contract.[5]

Some interesting situations arise in this connection. An adult cannot set up the infancy of the person with whom he deals, where that person does not set it up. Thus, in one case an infant bought goods from the adult on a conditional sale and sub-

[5] Flight v. Bolland, 4 Russ. 298 (Eng.).

sequently sold the goods to a third person. The adult vendor, in seeking to recover the goods from the third person or the infant, was not permitted to set up the infancy of his vendee.[6] The student must bear in mind that under the law in that jurisdiction, the one who had possession of a chattel under a sale, even if it was a conditional sale, could pass good title to a bona fide purchaser. Thus, in the above case, the point of infancy was the only possible ground of regaining the goods that the plaintiff had. In another situation, it was also held that where an infant took out an insurance policy but made a false representation in obtaining it, the beneficiary of the infant could enforce the policy against the company and set up the infancy of the insured as a reply to the defense of misrepresentation by the infant.[7]

37. **Same subject—After majority.**—It has been suggested that the right of disaffirmance of an infant's contract on the infant's attaining majority, ought to be mutual, and available as well by the adult, as by the infant. This is erroneous. The law is safeguarding the infant, not the adult. Thus it is held that unless the infant desires to avail himself of the right the adult cannot do so.[8] Doubtless where the infant obtained the better of the bargain, the adult might desire to have the contract abrogated. That, however, he cannot do. Thus, in a breach of promise suit brought by an infant, the

[6] Riley v. Dillon et al., 148 Ala. 283.
[7] O'Rourke v. John Hancock Mut. Life Ins. Co., 23 R. I. 457.
[8] Harris v. Musgrove, 59 Tex. 401.

adult could not set up the infancy of the other party to the contract.[9] It is to be observed that in this case the infant, though not of majority, had arrived at the age of consent. In one case an adult who was sued by an employer for enticing away his infant employe, could not set up in defense that the employe was an infant.[10] In explanation of this last case it might be said that in order for an action to lie for enticing away an employe, it must appear that the employe was under contract of employment for a fixed period. Thus if the adult could have used the infancy of the employe to disprove the existence of a contract, the action must have failed. It is doubtful that this last case would be followed in this country. The case cited is an English one. The very act of the infant in leaving the employer ought to be the infant's act of disaffirmance, so that it would not amount to an attempt by the adult to exercise the right for the infant. And this seems to be borne out by a later case in the same jurisdiction.[11] The situation as set up by these two cases, apparently contradictory, is this: Both are English cases and both are cases involving contracts of service. In England, an infant's contract of service, if it is beneficial to the infant, is absolutely binding. This will be apparent from a subsequent section in this text. The former case, then, was one where the court considered the contract beneficial to the infant, but in the latter case it was not

[9] Holt v. Ward Clarencieut, 2 Str. 937 (Eng.).
[10] Keane v. Boycott, 2 H. Bl. 511 (Eng.).
[11] De Francesco v. Barnum, L. R. 45 Ch. Div. 430 (Eng.).

so considered. That accounts for the diversity in the holding.

38. **Where infant disaffirms and then seeks to recover consideration he paid adult—Right to recover consideration.**—The situation now about to be considered differs from the one just discussed in that in the situation just covered the infant sought to affirm the contract and to compel the adult to perform according to its tenor, while in the situation now under consideration, the infant seeks to disaffirm his contract and then to proceed against the adult to recover some consideration that he, the infant, paid to the adult.

39. **Same subject—Where the infant has received no consideration from the adult.**—It is unnecessary to dwell upon this feature of the subject. It is self-evident from the theory of the protective policy of the law in favor of infants, that where the infant has received no consideration, he may recover what he paid on the contract.

40. **Same subject—Where the infant received consideration—Before majority.**—The general rule is, that an infant cannot, before majority, avoid his contract. But the law considers that this disability to avoid his contract must not operate to jeopardize his rights by the delay. A rule has, therefore, sprung up that where the infant wants to disaffirm a contract whereby he sold real estate, while he may not disaffirm before he attains majority, he may enter upon the land and take the rents and profits until his majority, and then disaffirm. In the case of property or rights other than real estate where the

contract was such that the infant himself had parted with no property, he may not disaffirm before majority; but where the transaction was such that he turned property over to the adult, and the property is such that he cannot enter and retake possession as in case of real estate, he may disaffirm before majority.[12] Where the infant, while still an infant, returned goods and chattels he bought of an adult vendor and the vendor accepted them with the intention by both parties at that time of disaffirming the contract, that was an executed and completed disaffirmance, notwithstanding the vendee was still an infant, and an act of the infant in subsequently retaking the goods is a tort for which he can be sued.[13]

41. **Same subject—After majority.**—The proper time, if at all, for an infant to disaffirm is after he attains his majority. Two situations arise with reference to his right to disaffirm at this stage.

a. Where infant still has the consideration. As seen above, under the general rule it is the right of the infant to disaffirm his contracts after he attains his majority and it is not necessary for him to return the consideration in the first instance. If, however, he still has the consideration, the adult party to the contract against whom the infant disaffirmed might proceed against the infant to recover that consideration, only the burden of showing that the infant still has the consideration is upon such adult person. Thus, if the consideration that the infant received was in goods, the adult may trace the goods, as the

[12] Stafford v. Roof, 9 Cow. 626 (N. Y.), LEADING ILLUSTRATIVE CASES.
[13] Edgerton v. Wolf, 6 Gray 453 (Mass.), LEADING ILLUSTRATIVE CASES.

disaffirmance revests the title in the adult, and he may recover them even from a purchaser from the infant.[14] If the consideration received by the infant was money, which has no earmarks, it would be practically impossible to trace the money, or even to show that the infant still had it, with the result that the adult would possibly lose the money. It will be seen hereinafter that some jurisdictions simplify matters for the adult by placing upon the infant the onus of proving he no longer has the consideration.

b. Where infant has parted with the consideration—Real estate—Disaffirmance, what constitutes. The common mode for an infant to disaffirm a deed of real estate executed during his infancy, was to execute after majority another deed inconsistent with the former deed. The English rule required in addition to this that where the land was at the time of executing the second deed in the possession of the grantee of the infant under the first deed, the infant must, in order to give his second deed the effect of a disaffirmance, make entry upon the land. This was not necessary where the infant was in the actual or constructive possession of the land himself, as where he had made entry before he attained his majority. Some American jurisdictions follow this rule,[15] but the better rule in America is that the deed alone is enough if it is inconsistent with the earlier deed.[16] The question then remaining is, when is a deed or instrument inconsistent with the prior one?

[14] Wallace v. Leroy, 57 W. Va., 263, LEADING ILLUSTRATIVE CASES.
[15] Harris v. Cannon, 6 Ga. 382.
[16] Cresinger v. Welch's Lessee, 15 Ohio 156.

A quitclaim deed does not operate to disaffirm a prior mortgage, because it is entirely consistent with the mortgage to execute a quitclaim deed subsequently, as that would be the natural thing to do in order to convey the equity.[17] A warranty deed would so operate, however. A quitclaim deed would operate to disaffirm a prior warranty deed.[18]

A deed executed during infancy may be disaffirmed by any other unequivocal act of disaffirmance. Thus, bringing an ejectment suit was held to disaffirm a prior deed.[19]

42. **Same subject—Estoppel.**—There are two conflicting rules as to whether an infant who conveys real estate and obtains consideration therefor is estopped by the fact that he misrepresented himself to be of the age of majority. The English cases are in accord on the principle that where the adult

[17] Singer Mfg. Co. v. Lamb, 81 Mo. 221.

[18] Bagley v. Fletcher, 44 Ark. 153.

[19] Drake's Lessee v. Ramsay, 5 Ohio 251. In McCarty v. Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136, the declaration by the infant on coming of age, made to the seller by letter, that he, the infant, repudiated the sale to him on the ground of his infancy, was sufficient to make a complete disaffirmance.

Accord: Doe v. Woodruffe, 7 U. C. Q. B. 332 (Canada); Hughes v. Watson, 10 Ohio 127, 134; Hoyle v. Stowe, 19 N. C. 320, 324; Chadbourne v. Rackliff, 30 Me. 354, 361; Webb v. Hall, 35 Me. 336; Cole v. Pennoyer, 14 Ill. 158; Birch v. Linton, 78 Va. 584, 590, 49 Am. Rep. 381; Clark v. Tate, 7 Mont. 171, 14 Pac. 761; Slater v. Rudderforth, 25 App. Cas. (D. C.) 497.

In Hoyle v. Stowe, supra, the court, by Ruffin, C. J., said: "It is not perceived, either, why the infant may not at once bring ejectment for the land, without a previous disaffirmance in pais; for the thing to be avoided is not an estate, but simply the deed. If an infant be sued on his bond, he disaffirms it by plea simply. If he sells personal chattels, he disaffirms the whole contract, whether by delivery or by deed, by suing for the chattels, which is the constant course. It is otherwise in the case of land, when the conveyance operated by way of transmutation of the possession. But a deed of bargain and sale is out of the reason of that."

relies on the infant's misrepresentation, the infant cannot later proceed in a court of equity to have the deed set aside. This has been followed by some jurisdictions in this country[20] and carried even to the extent of holding that an infant is estopped by silence, that is, by the mere act of making the conveyance.[21] The better rule in this country, however, considers that there is no estoppel whether from positive misrepresentations of the infant or from his silence.[22]

43. **Same subject—When the right to disaffirm after majority must be exercised.**—An infant, in the absence of estoppel or of laches in equity,[23] may exercise his right to disaffirm a deed of real estate any time within the period of the Statute of Limitations from the time of attaining majority (twenty years as to lands).[24] This rule has been modified in a number of jurisdictions. Thus in some jurisdictions the infant must disaffirm within a reasonable time, and what is a reasonable time is, of course, a matter of speculation.[25] Other jurisdictions consider that the period within which an infant may thus disaffirm should be analogous to the period which is, in the case of infants, added to the regular times of limitations by the statutes.[26] Thus in Illinois, he may disaffirm a deed and sue for the land within two years after attaining his majority.

[20] Schmitheimer v. Eiseman, 7 Bush 298 (Ky.).
[21] Ferguson v. Bobo, 54 Miss. 121.
[22] Sims v. Everhardt, 102 U. S. 300.
[23] For definition of laches see subject, EQUITY.
[24] Prout v. Wiley, 28 Mich. 164, LEADING ILLUSTRATIVE CASES.
[25] Goodnow v. Empire Lumber Co., 31 Minn. 468.
[26] Weeks v. Wilkins, 134 N. C. 516.

44. When infant has parted with the consideration—As to property other than real estate—English rule.—An infant goes to a shop with ready cash and buys some articles of luxury, for which he pays the cash. He then leaves the shop with the luxuries, disposes of them so that he no longer has them, and then returns and demands his money back. Can he do that? The English cases are clear that he cannot do that.[27] Here is a cash transaction that has been executed on the part of the infant and the adult both. Of course where the infant has received enjoyment of no part of the contract he may recover;[28] otherwise, he must return the benefit or consideration he has received, and if he is unable to do that, under the English authorities, he is precluded from disaffirming the contract and recovering what he paid. In the last case cited, the infant had subscribed for some shares of stock in a company, and paid for them. He never attended the stockholders' meetings and never received any dividends. Of course, he was permitted to disaffirm and recover what he had paid.

In certain kinds of contracts, in England, the infant cannot disaffirm in the absence of fraud, even if he does offer to return what he received. Those are contracts for services. But it must appear, in order to make those contracts binding, that they were beneficial to the infant.[29] Thus in one case it was held that an agreement by the infant to accept

[27] Holmes v. Blogg, 8 Taunt. 508 (Eng.).

[28] Hamilton v. Vaughn Sherrin Electrical, etc., Co., L. R. (1894) 3 Ch. 589 (Eng.).

[29] Clements v. London & North Western Ry. Co. (1894) 2 Q. B. Div. 482 (Eng.).

the provisions of an Employer's Liability Act for compensation in case of injury, was binding upon the infant. In another case it was held that an agreement by the infant at the time he entered into the employment, to give two weeks' notice of termination of employment and not to serve the employer's customers for his own benefit during the time he remained in the employer's service or for two years thereafter, was binding because, while these provisions of the contract of themselves were not beneficial, the whole contract of service must be taken together, and the whole contract of service, particularly with reference to the compensation to be paid, was beneficial.

American rule. In New York a distinction is made between conveyances of real estate and contracts that involve merely personal property. Thus the court considers that where the infant conveyed his real estate he could after majority disaffirm the conveyance even if he could not return what he had received.[30] But where it was personal property, he could not disaffirm without returning what he had received.[31] Where the consideration that the infant received was an article of personal property, as a horse,[32] or a bicycle,[33] it was held in New York, that he could not even disaffirm by returning the property unless it be returned in the same good condition in which it was received by the infant. Another jurisdiction distinguishes between a cash transaction and

[30] Green v. Green, 69 N. Y. 553.
[31] Hillyer v. Bennett, 3 Edw. Ch. 222 (N. Y.).
[32] Bartholomew v. Finnemore, 17 Barb. 428 (N. Y.).
[33] Rice v. Butler, 160 N. Y. 578.

one of loan. In the case of a cash transaction, the court considered that the infant might recover to the extent that he had not received the full value of his money.[34] In the case cited the infant had taken out an endowment insurance policy. After making payments for some years he desired to disaffirm and the court held that he might recover that proportion over and above the value of the insurance that he had received. However, where the infant borrowed money from a third person, notwithstanding that the money went into the purchase of a pony and the infant gave the lenders a mortgage on that pony to secure the identical money, it was held that he could disaffirm the mortgage and the note representing the loan without returning the money he had received.[35]

In Massachusetts, we find the extreme rule, that the infant need at no time return the consideration he received.[36] Of course, if the infant still has the consideration, as suggested in a foregoing section of this text, the adult may recover it from him, if he can identify it.

In still another jurisdiction the courts have imposed upon the infant, where he seeks to disaffirm and recover what he paid, the burden of showing that he no longer has the consideration and therefore cannot return it.[37] Hereinbefore attention was

[34] Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365, LEADING ILLUSTRATIVE CASES.

[35] Miller v. Smith, 26 Minn. 248.

[36] Chandler v. Simmons, 97 Mass. 508; Gillis v. Goodwin, 180 Mass. 140.

[37] Bailey v. Barnberger, 11 B. Mon. 113 (Ky.); Lane v. Dayton Coal & Iron Co., 101 Tenn. 581; Eureka Co. v. Edwards, 71 Ala. 248, LEADING ILLUSTRATIVE CASES.

called to the fact that the general rule does not require the infant to do this.

Same—Contract for services. The American rule, in the case of contracts for services, seems to consider that the infant's right to recover in an employment contract must be commensurate with the reasonable value of his services. If he has received pay for his services and that pay cannot be said to have been unreasonably little or insignificant, of course he may not recover. Suppose now that the contract of employment contains a provision that if the infant leaves without notice he shall forfeit what wages are due. Under the English rule, where the employment contract is a beneficial one, that, as we have found, binds the infant. In America, however, it is considered that such a stipulation would be depriving the infant of the protection given and intended by the law, and so would not be binding. However, the infant must disaffirm the whole contract and cannot disaffirm only a part of it. Thus the infant must disaffirm the agreement for services, for amount of compensation, and in fact all the provisions of the contract. What is the result? The law gets around that difficulty by holding that with the contract abrogated the infant may then recover the reasonable value of the services rendered on a *quantum valebant* or on a quasi-contractual basis.[38] Though the contract be abrogated, the adult has received something of value at the expense of the infant, for which the adult ought to pay.

45. **Same subject—No estoppel.**—The fact that

[38] Derocher v. Continental Mills, 58 Me. 217.

the infant made representations, whether positive, or those implied from silence, does not preclude him from disaffirming.[39]

46. **Same subject—Capacity of third persons to avail themselves of infant's right to disaffirm.**—As shown, the adult who makes a contract with an infant cannot, after the infant's majority, set up the infancy of his co-contractor in defense to a proceeding to compel his performance of that contract, where the infant has not disaffirmed it. Now, suppose that an infant makes a contract, and before majority assigns his part of that contract to another person, or suppose he dies before majority, and does not disaffirm the contract, can his assignee, or can the heir or devisee or person entitled at the death of the infant, disaffirm? In answer to that the law says that the sole heir may do so in the infant's stead, on arriving at his majority.[40] An assignee in insolvency of an infant could not disaffirm,[41] and where the infant died before majority and left a will in which he gave his property to devisees, it was held the devisees could not disaffirm.[42] For only the legal representatives, executors and administrators, or privies in blood, heirs and next of kin, may exercise the infant's right, for the right is personal to the infant.

Division III.—Miscellaneous.

47. **Exceptions to the right to disaffirm—Services.**—As noted above, in England, a contract for

[39] Carpenter v. Carpenter, 45 Ind. 142.
[40] Harvey v. Briggs, 68 Miss. 60.
[41] Mansfield v. Gordon, 144 Mass. 168.
[42] Bozeman v. Browning, 31 Ark. 364.

services if beneficial to the infant is binding upon him in every particular. The American rule does not go to that extent. However, where an infant who is emancipated and so has the right to contract for his services, makes a contract whereby he accepts goods and articles of value in lieu of money, as compensation or pay, he is bound by such payment, and cannot, after he has disposed of these articles or goods, disaffirm the contract and require money for the value of his services,[43] even if such articles are not necessaries.

48. **Same subject—Necessaries.**—The rules covering the infant's contracts for necessaries are for the most part set out in the treatment of the situation where the adult takes the initiative. Under the treatment at this place, as to whether the infant can disaffirm and recover back his money or consideration, the rule is that where it was a contract for necessaries, he cannot do so if the price charged for the necessaries was a reasonable price. If not, he may recover the excess.[44]

49. **Same subject—Partnership.**—The third exception to the rule of disaffirmance is in the case of partnership. Where the partnership is solvent and has enough to pay debts over and above the capital, the question does not arise. There the infant may disaffirm his partnership contract like any other contract, because his disaffirmance works against his partner only. Where, however, the partnership is indebted and the capital of the partnership is needed

[43] Waugh v. Emerson, 79 Ala. 295.
[44] Stone v. Dennison, 13 Pick. 1 (Mass.).

to pay the debts, the penalty of disaffirmance is the surrender of all the assets of the partnership, and the infant loses what he has put into it, though he is not, like an adult, subject to further liability.[45] It was suggested that in such cases the partners of the infant ought to make up for him his lost capital, but this is not the rule, for adults dealing with infants are liable only to return what property of the infant they received, and where the creditors take the assets, the partners cannot be said to have received the infant's property.[46]

50. **Same subject—Acts of infant's counsel in course of litigation.**—The policy of the law binds even infants to the acts of counsel in the course of litigation. Thus in one case where an infant sued for personal injuries, and his attorney entered an agreement of record for dismissal of the suit, for which the defendants paid one thousand dollars in settlement, the infant was bound, even though he was ignorant of this.[47] In that case the attorney absconded with the proceeds of the settlement. This case is an extreme case on the subject. The general rule, when it comes to settling a claim of an infant where suit has been brought, is that such settlement is not good except by leave of court,[48] and in Illinois the practice is to have a jury return a verdict for the amount of settlement after the infant has expressed his satisfaction therewith in open court. In most jurisdictions an infant, when suing for per-

[45] Shirk v. Shultz, 113 Ind. 571.
[46] Moley v. Brine, 120 Mass. 324.
[47] Beliveau v. Amoskeag Mfg. Co., 68 N. H. 225.
[48] P. C. C. & St. L. Ry. Co. v. Haley, 170 Ill. 610.

sonal injuries, or otherwise, cannot sue in his own name, but must sue by a next friend and such next friend cannot compromise his claim, any more so than can the attorney, whether before or after suit is brought.

51. **Infant's act appointing agents void.**—The great weight of authority is that an infant's act appointing an agent is absolutely void. His other acts are voidable, that is, they can be ratified by him; but his act appointing an agent or giving a power of attorney is absolutely void and cannot be ratified.[49]

One particular case illustrates well the force of this rule.[50] In that case the infant employed an agent to trade his horse for another horse for him. The agent succeeded in making the trade the infant wanted. As a matter of fact he did better; for $15 to boot, which $15 the agent paid out of his own pocket, the agent traded in not only the horse the infant authorized him to get, but also another horse. This second horse the agent said nothing about, but kept. When the infant learned of this he tendered the $15 to the agent and demanded the horse. The agent set up in defense that at the time his principal was an infant. We have seen that if this had been a voidable contract merely, the adult could not have set up the infancy; but it was not merely a voidable act but a void act, so that there was no agency at all, and no fiduciary relation of

[49] Waples v. Hastings, 3 Harr. 403 (Del.); Trueblood v. Trueblood, 8 Ind. 195.

[50] Poston v. Williams, 90 Mo. App. 513.

agency existed.[51] Thus there was no right to recover the second horse.

One state has discarded this rule,[52] and holds that the infant's power of attorney is voidable and not void, like any infant's contract. This is not the general rule but is an unusual exception.

52. **Effect upon adult's rights where infant disaffirms.**—Suppose that the infant disaffirms his contract after he attains his majority, what effect has that on the rights of the adult as to the consideration that the infant received, where the infant still has the consideration? That was considered at some length in a preceding section. Suffice it to say in this place that where an infant after majority disaffirms a sale when the adult sues him for the purchase price, he cannot, if afterwards the adult sues him for the property itself, affirm the sale in order to retain the property.[53] In a certain case, an infant disaffirmed a loan secured by a mortgage on premises. The proceeds of the loan were used to construct a building on the land. It was considered that the lender might then turn around and foreclose the mortgage to the extent that the land was improved by the building, though he was not entitled to recover anything on account of that part of the loan that had gone to paying special assessments against the land or even that part of the loan that had been used to pay what was still due on the purchase price of the land.[54] This is in harmony with the rule set

[51] See subject, LAW OF AGENCY.
[52] Coursolle v. Weyerhauser, 69 Minn. 328, LEADING ILLUSTRATIVE CASES.
[53] Strain v. Wright, 7 Ga. 568.
[54] MacGreal v. Taylor, 167 U. S. 688.

out hereinbefore. So far as the money was blended with the real estate, the infant could not be said longer to have it, and so when he disaffirmed there was nothing for the adult to recover; but as to what was of such a nature that the money or its altered form could be pointed out, the adult might take it.[55] In one case an infant bought some steers while he was a minor, for which he gave a note. After majority, which was before the note became due, he tendered them back but demanded that the seller in return pay him for the feed and keep of the steers, and he was permitted to hold the steers until the adult paid him for their feed and keep.[56]

[55] Fitts v. Hall, 9 N. H. 441.
[56] Tower Toyle Com. Co. v. Smith, 86 Mo. App. 490.

CHAPTER V.

INFANT'S LIABILITY FOR TORTS.

53. **Infant liable for torts.**—An infant has not in tort the protection that is given him in his contracts. In tort, i. e., for injuries to the person or property of another, an infant is just as fully liable for his acts as an adult. For example, a defective wall on the infant's property toppled over onto the neighbor's property and caused injury there. The infant personally had nothing to do with the care of his property, for he had a guardian, duly appointed by court, who attended to the property. Notwithstanding, the infant was held liable in damages to the neighbor.[57] This liability holds even though the infant be of extreme youth,[58] and the fact that the infant, in committing the tort, acted under the father's authority or direction is no defense.[59]

54. **Torts connected with contracts.**—Where, however, to hold the infant liable for his torts would operate directly or indirectly to enforce a contract that the infant had entered into but which he has elected to disaffirm, he is not liable even in tort.[60]

Fraud. This question most commonly arises in case of fraud, deceit or misrepresentation. Here the

[57] McCabe v. O'Connor, 38 N. Y. Supp. 572.
[58] Huchting v. Engel, 17 Wis. 230.
[59] Scott v. Watson, 46 Me. 362.
[60] Slayton v. Barry, 175 Mass. 513.

question is, does the wrong grow out of the contract relations or not? If it does, the fraud is no more enforcible than the contract itself would be, for to refuse to enforce a liability against an infant under the style of an action on the contract and yet to permit what is in effect the same liability to be enforced against the infant under the style of an action for fraud, would not be consistent. Therefore, if the result of enforcing a suit for fraud could at all be said to amount to hindering the infant from availing himself of his right to disaffirm, the law will refuse to enforce it. However, if to enforce a liability for the fraud is not another way, merely, of enforcing the contract, in that case, a tortious liability will be enforced. Thus in one case,[61] an infant plied an adult with intoxicants until the adult was drunk, and while he was in that condition took advantage of him in a trade. The adult later sued on the note the infant had given him in the trade, and the infant escaped liability thereon by disaffirming the contract. The infant had disposed of the consideration he got in the trade and could not return it on that account, so the adult sued in tort for conversion of the property by the infant. Now the situation here was not that of the infant procuring a contract by misrepresentation, but that of putting the adult into a condition wherein he was taken advantage of. This was considered an act that rendered the contract voidable at the instance of the adult. The adult tried to affirm but the infant rejected the offer. The wrong of the infant was therefore left unratified,

[61] Walker v. Davis, 1 Gray 506 (Mass.).

and the adult was free to bring suit for the fraud if its enforcement did not operate to enforce the contract. But the act of suing for the fraud, here, instead of operating to enforce the contract, operated to reject it, and so was properly maintained.

In Illinois it is held, on analogy to the criminal law in larceny,[62] that where an infant purchases goods by false representations, not intending at the time of purchase to pay for them, the wrongful act of refusing to pay for them when payment is due relates back to the time when the purchase was made with the result that in such case there was no contract of sale or purchase at all but a stealing by the infant, for which he was liable in tort, and there being no contract, enforcement of such liability could not be an enforcement of a contract.[63]

Other cases. This matter of the infant's liability in tort and the danger of enforcing a contract liability by enforcing the tortious one, occurs in other cases as well, besides those of fraud. Suppose an infant hires a horse and mistreats him; rides him too hard, or inflicts excessive beatings upon him. If an adult did that, the adult would be liable in tort because one who hires a horse represents by that hiring that he will give the treatment to the animal that one accustomed to use such animals would give. That cannot be the rule with the infant, because the infant's act of hiring is voidable and with it all representations that are implied from such hiring, to say nothing of express representations in the contract.

[62] See subject, CRIMINAL LAW.
[63] Ashlock v. Vivell, 29 Ill. App. 388.

Therefore, if the infant without malice or wantonness drives the horse too hard, or whips him excessively, he is not liable. But if he act maliciously or wantonly, and not simply to get all the value he can out of his contract, he is liable, because he would not then be acting under the contract. So also if he hired the horse to go to one place, and instead went to a different place, he would not be acting under his contract and would be liable in tort for any injury to the animal from the trip.[64] In one case an infant ran a threshing machine and did not use a spark arrester. If an adult had so run the thresher, there was no question but that this manner of running it was so negligent as to subject the adult to liability for damage from fire set by sparks from the engine. A fire was caused by sparks from the infant's engine, but he was not liable, so the court held, because to hold him liable would amount to an enforcement of his contract to do threshing.[65] It is submitted that this argument is not sound unless it can be said that it was because of an implied agreement of his contract of threshing, that he should have used the spark arrester. It is submitted that his duty to use a spark arrester did not arise from the contract but from the circumstances of using the engine, and that he was bound to use a spark arrester if he ran the engine gratis and without any contract, and so should be liable for all injury due to failing to use it.

[64] Young v. Muhling, 63 N. Y. Supp. 181; Freeman v. Boland, 14 R. I. 39. Accord: Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64. Contra: Wilt v. Welsh, 6 Watts 9 (Pa.).

[65] Lowery v. Cate, 108 Tenn. 54.

CHAPTER VI.

INFANT'S POWERS, LIABILITIES, AND DISABILITIES.

55. **Infant's responsibility for crimes.**—An infant under seven years of age cannot be convicted of a crime because the law says that one of that age is incapable of criminal intent, and intent is necessary to make a crime. Between the ages of seven and fourteen years, the law requires the state or government to affirmatively prove that he had the criminal intent. As appears from the text on criminal law, if an adult deliberately lies in wait for another and then shoots him dead, the intent is presumed. That is not true as to infants between seven and fourteen years. Where the infant is over the age of fourteen he is equally liable as one of full age.

The rule set out above as to the age between seven and fourteen years applies only to felonies and does not apply to misdemeanors. As to misdemeanors one between seven and fourteen years of age is not guilty of a misdemeanor where he did not know that he was violating the law.[66] If an adult person violates the law, it is no excuse for him to say that he did not know that he was violating the law, for the maxim, ignorance of law excuses no one,[67] is of universal application in the criminal law.

[66] State v. Yeargan, 117 N. C. 706.
[67] *Ignorantia Legis Neminem Excusat.*

56. **Power of infant to make will.**—At common law an infant could not devise realty, but males at fourteen could will personalty, and females at twelve; this was the rule of the civil law. The matter is now regulated by statute, and frequently a distinction is made between real and personal property, twenty-one being fixed as the age for devising realty, and a less age for disposing of personalty.[68] In Ohio, Massachusetts, Indiana, Michigan and other states full age is required to dispose of either real or personal property.

57. **As to testifying.**—The test of an infant's capacity to testify is the ability to appreciate the nature of an oath, and sufficient intelligence to comprehend as a witness.[69] The intelligence required is a just appreciation of the facts respecting which testimony is required, and ability to relate them truly. Children have been permitted to testify at the age of seven, and even at five.[70]

58. **General disabilities of infants.**—An infant is presumed incapable from lack of age of acting with the ability and capacity of an adult. Hence an infant may not hold a legislative or judicial office; or be an executor or trustee, or be a juror or an attorney at law, or in general hold any office of pecuniary and public responsibility.[71] But an infant may be a notary public,[72] also a deputy sheriff, and an agent.[73]

[68] Schouler, Wills, § 43.
[69] 1 Greenleaf, Evidence, § 366.
[70] Peterson v. State, 47 Ga. 524.
[71] Schouler, Domestic Relations, § 394.
[72] U. S. v. Bixby, 9 Fed. 78.
[73] Browne, Domestic Relations, 106.

PART III

HUSBAND AND WIFE

CHAPTER VII.

INCEPTION AND NATURE OF MARRIAGE RELATION.

59. **History and definition.**—Professor Kales in his introduction to the subject of Husband and Wife[74] says: "During the last sixty years the law of husband and wife has gone through an evolution which has eliminated a great deal of what was once highly important. In the first half of the nineteenth century the law of husband and wife, especially with reference to the property rights of the wife, consisted of certain rules which were administered by the courts of chancery. About the middle of the nineteenth century many states in this country, by statutes following the lines laid out by the courts of chancery, modified the rules applied in the courts of law. These statutes were on their face of partial effect only, and many nice and difficult questions as to their indirect effect were raised. Most states at a perceptibly later time passed complete reform legislation, in which most of the old law was entirely swept away. It will thus be observed that several topics of the law of husband and wife must be considered in four stages: (1) At common law; (2) in

[74] Kales, Cases on Persons, p. 337.

equity; (3) under the half-way statute; and (4) under the complete reform legislation. The first two stages are of general interest and applicable to all jurisdictions alike, where the law is founded upon the common law of England. It is now, however, largely of historical interest. Obviously it is impossible to deal with the two last stages from any 'general law' point of view. The best that can be done is to take typical legislation, and to show how the law has developed under it, giving examples of different results under similar statutes to illustrate the varying dispositions of different courts in dealing with the same problem of statutory construction."

Marriage is sometimes spoken of as a contract, made in due form of law, by which a man and a woman reciprocally engage to live together during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife.[75]

Our law, says Blackstone, considers marriage in no other light than as a civil contract. It treats an unlawful marriage not as a sin, but merely as a civil inconvenience. The law treats marriage as it does all other contracts, allowing it to be good and valid in all cases where the parties at the time of making it, first were willing to contract, second, were able to contract, and, third, did contract, with the proper forms and solemnities required by law.[76]

60. **Nature of the contract.**—Though marriage is considered as a civil contract, it has some incidents

[75] Bouvier's Law Dictionary, "Marriage"; Schouler, Dom. Rel., § 12.
[76] Blackstone, Commentaries, p. 433.

which make of it a particular species of contract, or rather a "domestic relation resulting from contract." No bill in equity or other proceeding lies to compel the specific performance of the promise, though damages may be recovered for the breach. So contracts in restraint of marriage and in procuration of marriage are void, as against the policy of the law. The relation, though formed by mutual consent, cannot be thus dissolved; parties once married can only be separated by death, or a solemn divorce granted by the general or special ordinance of the legislature, or in the United States by a court having jurisdiction. The capacity of the parties is more carefully regulated than in other species of contracts.[77]

61. **The executory agreement to marry.**—The agreement to marry is quite distinct in its nature and consequences from that natural consent to present marriage which results in the marital status. It is a mere executory contract founded upon a consideration, which consideration in most cases is the mutual promises of the parties, and is governed largely by the same rules as other contracts. It differs from other contracts because the parties must be persons competent to enter into the contract of marriage and must act in good faith, and without deception or fraud. So ill conduct in one of the parties promised or engaged to marry, of a nature and to a degree not quite definable, yet far less than would be required for a divorce after marriage, will justify the other in breaking the contract.[78]

[77] Cooley, Blackstone's Commentaries, I, p. 433, note; Schouler, Dom. Rel., § 13.

[78] Bishop, Marriage, Divorce and Separation, § 82.

The contract to marry must be mutual, that is, there must have been an intention to enter into an agreement, as by an offer and acceptance. But this contract may be proven from the circumstances usually attending an engagement, and the acceptance may be implied. The contract is not within the Statute of Frauds, and is valid though not to be performed within a year.[79] Mutual promises are sufficient consideration, but a contract founded upon an immoral consideration would be void. This contract, when properly made between capable parties, is binding, and either party has an action for damages against the party refusing to carry out the contract.[80]

62. **Breach of promise.** — The well-known and much-abused action of breach of promise results from the failure of one of the parties to fulfill the executory agreement to marry. The action is sustainable by a man against a woman, but it is usually the woman who asks this primary consolation, for when the female is the injured party there is generally more reason for a resort to the laws, than when the man is the sufferer. The damage sustained, doubtless, is always more in the case of the woman, and in determining it, the actual money loss plays but a small part, the wounded spirit, the unmerited disgrace, and the probable solitude which would be the consequences of desertion after a long courtship, being the great factors.[81]

[79] Lewis v. Tapman, 90 Md. 294, 45 Atl. 459.

[80] Cooley, Blackstone's Commentaries, I, p. 433, note; Wetmore v. Mell, 1 Ohio St. 26; Cole v. Holliday, 4 Mo. App. 94; Inhabitants of Taunton v. Inhabitants of Middleborough, 53 Mass. 35.

[81] Wightman v. Coates, 15 Mass. 1.

The party ready to perform may request performance and offer to perform the contract before bringing the action. But this is not necessary on the part of the woman if a time has been fixed for carrying out the agreement, or a reasonable time has elapsed since the mutual promises, and she is ready and willing.[82] The fact that the party in default is incapable of carrying out the agreement, as where already married, is no defense, if the plaintiff was ignorant of that fact when the promise was made. And the injured party may sue at once without waiting for the time of performance, or making any offer or demand. But where the incapacity to perform the agreement is known to both parties before the making of the agreement, neither party may sue.[83] So where both parties are ignorant of the incapacity, or it arises, without fault, after the agreement, as mental incapacity, the contract is void.[84]

63. **Circumstances excusing a breach of contract.** —The rules of contract apply to promises to marry as well as to other contracts with the exceptions that have just been noted. There are, however, some situations peculiar to contracts of marriage, that should be considered in this connection. Thus, one may avoid performing a contract that he has entered into on the ground that the contract is against public policy, or that it is void for some other reason, or he may avoid it on the ground that the other induced him to enter into it by fraud. In contracts

[82] Turner v. Baskin, 2 Ohio Dec. 24.
[83] Paddock v. Robinson, 63 Ill. 99.
[84] Chitty, Contracts, p. 795.

of marriage it is against public policy for a man and woman already married to others, to agree to marry upon procuring divorces,[85] or even for an unmarried person to agree to marry a married person where he knows of the other's marriage, notwithstanding the agreement is to take effect after the death of the other's spouse. Such contracts are void and unenforcible. Suppose, then, that one who was married, represented to a woman that he was unmarried, proposed marriage to her, and she, believing him to be unmarried, agreed to marry him. Can the deceived woman sue the man for breach of contract to marry? Apparently courts are in conflict on this situation. Some courts consider that the whole contract is void, because the married person was not able to make such a contract, and therefore there could be no breach of the contract upon which to sue.[86] A better considered rule, however, holds that the married person who deceived the other should not be permitted to rely upon his own wrong to defeat the action.[87]

In cases where there is knowledge that the one person is already married, it is held to be inconsistent with the affection that ought to exist between husband and wife for the one to enter into an agreement to marry a third person upon the other's death. One case argues that this rule is not immutable, but that such a promise might not be against public policy in all cases, as where one's

[85] Paddock v. Robinson, 63 Ill. 99.
[86] Eve v. Rodgers, 12 Ind. App. 623, 40 N. E. 25.
[87] Wild v. Harris, 7 C. B. 999 (Eng.).

spouse was in a lunatic asylum and incurably insane, or where one's spouse expressly asked him to marry a particular person.[88]

Fraud excuses a breach of contract to marry. The question then arises, what constitutes such fraud? The mere failure of the one party to notify the other that she had at one time been in an insane asylum was held not to excuse a breach by that other.[89] The same case sets up the English rule that unchastity on the part of the one person is all that will excuse. The question is properly to be considered with reference to whether the person charged with the fraud has made a positive misstatement, or has merely remained silent as to some matters of family history. The rule is undisputed, apparently, that mere silence as to family history, with nothing more, is not fraud. Even express misstatements as to matters that do not affect the health or morals or identity of the parties, are not fraud that interferes with the contract. The statements must be material. But misstatements as to material facts or partial statements with a suppression of other material statements so as to give a wrong impression, do constitute fraud excusing breach.[90] As to whether mere silence as to existing disease or illness will excuse breach, the cases are in conflict. The general rule is that where, at the time of entering into the contract, the parties knew of the illness, its existence furnishes no excuse for breach,

[88] Wilson v. Carnley, 23 Times Law. Rep. 578 (Eng.).
[89] Baker v. Cartwright, 10 C. B. (N. S.) 124 (Eng.).
[90] Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705.

unless it can be said that public policy makes it undesirable for the contract to be enforced, as where one party has consumption.[91] But even where there was ignorance of the disease, some cases hold it is not an excuse,[92] though the majority of the cases hold that it is, at least where the disease affects the reproductive organs.[93]

Of course, if the parties release each other from the engagement neither can bring an action for breach of promise and a cessation of intercourse and correspondence is evidence of such release, particularly where it is not reconcilable with any other theory.[94]

When the action is maintainable the plaintiff is entitled to damages for the mental suffering, mortification and pain resulting from the defendant's failure to perform, also to punitive damages in case of seduction.[95] Infancy of the defendant at the time the promise was made is a good defense.[96]

64. **Void and voidable marriages.**—The words void and voidable are frequently used in relation to marriages, and it is important to understand at the outset the distinction in effects and consequences between a void and a voidable marriage. A void marriage is a mere nullity, and its validity may be impeached in any court, directly or collaterally, and whether the parties be living or dead. A voidable

[91] Grover v. Zook, 44 Wash. 489, 87 Pac. 638.

[92] Smith v. Compton, 67 N. J. L. 548.

[93] Sanders v. Coleman, 97 Va. 690, 34 S. E. 621; Allen v. Baker, 86 N. C. 91; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79.

[94] Davis v. Bomford, 6 H. & N. 245 (Eng.).

[95] Glasscock v. Shell, 57 Tex. 215.

[96] Rush v. Wick, 31 Ohio St. 521.

marriage is valid for all civil purposes until a competent tribunal has pronounced the sentence of nullity, upon direct proceedings instituted for the purpose of setting the marriage aside. Voidable marriages once set aside are treated as void from the beginning (ab initio), and are no more protection to the parties or their issue than void marriages; but such suit of nullity must have been concluded in the life time of both parties, or it will fail and the union be treated as lawful from its inception. Modern statutes tend to treat defective marriages as voidable rather than void, and further to modify the doctrine that a sentence of nullity makes a voidable marriage void from the beginning.[97]

65. **Elements essential to a valid marriage.**—To constitute a perfect marriage, "the contracting parties should be two persons of the opposite sex, without disqualification of blood or condition, both mentally competent and physically fit to discharge the duties of the relation, neither of them being bound by a previous nuptial tie, neither of them withholding a free assent; and the expression of their mutual assent should be substantially in accordance with the prescribed forms of law."[98]

These being the essentials of marriage, the following subjects will be considered: 1. Relationship as a disqualification; 2. Civil or social position; 3. Mental capacity; 4. Physical capacity; 5. Proper age; 6. Prior marriage; 7. Force, fraud, and error;

[97] Schouler, Dom. Rel., § 14; 1 Stimson, Am. Stat. Law, § 6116.
[98] Schouler, Dom. Rel., § 15.

8. Proper celebration of the marriage as prescribed by law.

66. **Relationship as a disqualification.**—Relationship is either by consanguinity or affinity. Consanguinity is blood relationship, or the connection imputed to those persons having a common ancestor. Affinity is a relationship resulting from marriage, as between the husband and the blood relations of the wife, or between the wife and the blood relations of the husband.[99]

Marriages between near relatives have quite generally been forbidden among civilized nations as unclean and incestuous. Such marriages are also forbidden by the Mosaic law. There can be little doubt but that such prohibitions are well grounded in reason, and necessary to protect public morals and health; the difficulty arises in fixing a reasonable limit to these prohibitions, and in deciding whether relationship by affinity as well as by consanguinity shall disqualify. Ecclesiastical courts at one time in England extended the prohibitions to the seventh canonical degree; but this restraint became so intolerable as to demand a statutory modification.[1] This statute, which is still essentially in force in England, prohibits all marriages between nearer relations than first cousins, and reduces the prohibitions to the third degree of civil reckoning, ascending or descending. The prohibitions of this statute extend to illegitimate children, and to

[99] 2 Blackstone, Commentaries, pp. 202-6; Abbott's Law Dictionary, "Consanguinity" and "Affinity."

[1] 32 Hen. VIII, c. 38.

half-blood relations. The principles of this statute are recognized in the United States, but have been reënacted in state statutes, and modified to some extent. Thus marriage between uncle and niece, or between aunt and nephew, is forbidden in some states.[2] And in Ohio, Indiana, Nevada, and Illinois, persons more nearly related than second cousins may not marry.[3]

The English law regards affinity as an impediment equally with consanguinity, and enforces the rule though the marriage constituting the relation has ended by death or divorce. So in England a man may not marry his deceased wife's sister, but this rule has never obtained in the United States.[4]

But by statute in the various states, affinity as applied in a lineal direction constitutes a bar to marriage. Thus, a man may not marry his father's widow, nor a woman her husband's son. And a man may not marry a son's widow, and conversely.

Marriages within the prohibited degrees are considered void in some states, in others parties sue for a decree of nullity. At common law the issue of such marriages are illegitimate.[5]

67. **Civil or social position as a disqualification.** —At common law neither race, color, nor social position was an impediment to marriage. While social position, religion, etc., are no bar to marriage in the United States, yet by statutes in some states

[2] Harrison v. State, 22 Md. 468.

[3] Schouler, Dom. Rel., § 16; 1 Bishop, Mar. & Div., 5th ed., §§ 315, 317; Rev. Stat. Ohio, § 6384; Stimson, Am. Stat. Law, § 6111.

[4] Blodget v. Brinsmaid, 9 Vt. 27.

[5] Harrison v. State, 22 Md. 468; 2 Kent, Commentaries, 83, 84.

marriages between different races are forbidden, as between a white and a black, a white and an Indian, or a white and a Chinese. Such marriages are called miscegenation (mixing races) and are punishable in the states forbidding them. Such legislation is not contrary to the Federal Constitution.[6]

68. **Mental capacity.**—The marriage relation is founded upon the consent of the parties, and this consent cannot be given by one incapable of appreciating the nature of the relation.[7] No one can contract a valid marriage unless capable at the time of giving an intelligent consent; hence the marriage of idiots, lunatics, and all others who have not the use of their understanding at the time of the union is treated as void.[8]

Every case of mental incapacity stands on its own merits, and so far as a test can be provided it is, that the party must have sufficient intelligence to understand the nature of the marriage contract, and to perform the duties and responsibilities it creates.[9] So mere weakness of mind or eccentricities of conduct are not sufficient to invalidate the marriage.[10]

The disability must have existed before the time of the ceremony, and must have been unknown to the other party. Insanity developing after marriage is

[6] Browne, Dom. Rel. 3; State v. Gibson, 36 Ind. 389, LEADING ILLUSTRATIVE CASES; Pace v. Alabama, 106 U. S. 583, LEADING ILLUSTRATIVE CASES; State v. Jackson, 80 Mo. 175, LEADING ILLUSTRATIVE CASES.

[7] Turner v. Meyers, 1 Hag. Con. 216 (Eng.).

[8] Schouler, Dom. Rel., § 18.

[9] Ward v. Dulaney, 23 Miss. 410; Atkinson v. Medford, 46 Me. 510.

[10] Smith v. Smith, 47 Miss. 211; Powell v. Powell, 18 Kan. 371; Baker v. Baker, 82 Ind. 146; Nonnemacher v. Nonnemacher, 159 Pa. St. 634.

not a cause for divorce, and nothing which is a consequence of such insanity can be a cause.

Drunkenness, which is analogous to insanity, is treated as temporary insanity, and if at the time of the union the party was in a state of delirium tremens, or unable to understand the act of marriage, such marriage is invalid. Deaf and dumb persons, formerly classed as idiots, may now marry. So deafness, blindness, etc., are not treated as incapacities, and a marriage during a lucid interval by a lunatic is valid, but query, if a commission of lunacy remains unrevoked.[11]

Mental incapacity generally renders the marriage void, and it may be impeached directly or collaterally, but by statute many states require a sentence of nullity, and treat the marriage as voidable only. So by statute, after sentence of nullity, the children may be declared the legitimate offspring of the party legally competent to marry.[12]

69. **Physical capacity.**—Physical incapacity, or impotence, existing at the time of the marriage, will render it invalid.[13]

By physical capacity is meant simply that the sexual organization of both parties shall be complete. But mere barrenness or incapacity of conception constitutes no legal incapacity; nor a physical defect which does not interfere with copulation; nor, indeed, any disability which is curable.[14] So if a man knowingly marries a woman past the child-

[11] Schouler, Dom. Rel., § 18.
[12] 2 Kent, Com., 76; 1 Bishop, Mar. & Div., 5th ed., §§ 136-142.
[13] Powell v. Powell, 18 Kan. 371; Morrell v. Morrell, 17 Hun 324 (N. Y.).
[14] Schouler, Dom. Rel., § 19.

bearing age, he cannot have the marriage annulled on the ground of impotence. To set aside a marriage on this ground the decree of a competent court should be invoked.

70. **Proper age.**—Infancy or non-age is presumed to affect the mental and physical capacity of parties and hence is an impediment to a valid marriage. The common law fixed the marriageable age at fourteen for males, and twelve for females, and this age was also regarded as the age of puberty. State statutes have variously determined this age, ranging from fourteen to eighteen for males, and twelve to sixteen for females. Marriages between persons who have attained this age are valid; but if one or both of the parties are within such age, the marriage may be avoided by either on reaching the statutory age.[15]

On reaching the prescribed age, continued intercourse, or slight circumstances indicating the intention of the parties to ratify the marriage, will complete it, and no new ceremony is required. So the disaffirmance may be with or without judicial sentence.[16] And false representations by the infant as to his age does not estop him from annulling.[17] The marriage is neither void nor voidable, but inchoate and imperfect until either ratified or disaffirmed.

71. **Prior marriage undissolved disqualifies.**—

[15] 1 Bishop, Mar. & Div., § 149. Some states require the consent of the parents to a marriage where the principals, or either of them, are under a certain age. The question has arisen whether the omission to obtain such consent rendered the marriage invalid, and it has been held that unless the statute expressly provided that the marriage be void in such case, it will not be void, but the principals and accessories will be guilty of violation of the law.

[16] Schouler, Dom. Rel., § 20.

[17] Eliot v. Eliot, 81 Wis. 295.

Where a valid marriage exists, a later marriage contracted by either party is void.[18] Moreover, the guilty party is subject to criminal prosecution for bigamy.[19] Polygamous or bigamous marriages are prohibited in all of the states, and though tolerated in Utah, were never sanctioned.[20]

To make the second marriage invalid the first must have been binding in all respects.[21] In the absence of statute, nothing but death or divorce dissolves the first marriage so as to enable the parties to marry again. The second marriage being void, the incidents of a valid marriage do not follow, and unless the statutes relieve, the children are illegitimate.[22] By statute, where the subsequent marriage is contracted in the erroneous belief that the other spouse is dead, the children may be declared legitimate, and the party relieved of criminal liability.[23]

Where state statutes prohibit the guilty party, though divorced, from marrying again for a limited time, or during the life of the innocent spouse, a marriage within the state would be void, but it is held that a marriage contracted by the party without the state, though for the purpose of evading the prohibition, is valid;[24] but otherwise where there is a specific statute to the contrary.[25]

Thus, if one were divorced in Illinois on the ground

[18] 2 Kent, Commentaries, 79.
[19] Rev. Stat. Ohio, § 7018.
[20] Reynolds v. U. S., 98 U. S. 145.
[21] Bruce v. Burke, 2 Add. Ec. 471 (Eng.).
[22] 4 Blackstone, Commentaries, p. 164; Glass v. Glass, 114 Mass. 363.
[23] Schouler, Dom. Rel., § 21; Stimson, Am. Stat. Law, §§ 6112-6116.
[24] Thorp v. Thorp, 90 N. Y. 602.
[25] Van Voorhis v. Brintnall, 86 N. Y. 18.

that he had committed adultery, he would be barred by the law of Illinois for two years from remarrying anyone but the woman who had divorced him. He could, however, go to Indiana and within the two years contract a marriage with another woman that would be valid in Indiana and, in fact, everywhere else, because the "Full Faith and Credit" clause of the United States Constitution would require every other state to recognize such marriage, but with this exception: if the act of going into Indiana was merely for the purpose of evading the Illinois law, with the intention of coming back to Illinois to live, it would amount to a fraud on the state of Illinois, and a misuse of that particular clause in the United States Constitution, and as such, the courts of Illinois would not recognize the Indiana marriage, the "Full Faith and Credit" clause notwithstanding. However, if after the divorce in Illinois the divorced person went to Indiana with the bona fide purpose of making that his home and while there married another woman within the two year period, it is submitted that such could not amount to a fraud against the law of Illinois and that such remarriage would be valid even in Illinois; so that if the husband died in Indiana, having property in Illinois, the second wife would have to be recognized as such; or even if subsequently the couple bona fide relinquished their domicile in Indiana and came back to Illinois, Illinois must recognize the marriage.

72. **Force, fraud and error may invalidate a marriage.**—Force implies a physical constraint of the will; fraud, some deception changing the natural

state of the will; and error, one or both of these factors, influencing the person's free will. In each of these cases, there being no mutual consent, a marriage so brought about is invalid.[26]

What amount of force will invalidate depends upon the circumstances, and varies with the condition and situation of the parties, the general rule being that an amount of force sufficient to overcome one's free will and inspire terror will render the marriage null.[27] A person forced to marry while under an illegal arrest may avoid the marriage, but one who marries by the advice of magistrate while under arrest for bastardy, in order to escape prosecution or imprisonment, will be bound.[28]

It is said that fraud, to vitiate a marriage, must go to the very essence of the contract. A fraud that would justify breaking the engagement to marry may not be sufficient to avoid the marriage. This relation involves too many interests to be disturbed for trifles. So fraud concerning matters accidental in their nature, as character, fortune, temper, social position, and the like elements, not essential to the marriage relation, will not affect the validity of the marriage.[29]

[26] Schouler, Dom. Rel., § 23.

[27] Bishop, Mar. & Div., § 211; Harford v. Morris, 2 Hag. Con. 423 (Eng.); Lyndon v. Lyndon, 69 Ill. 43.

[28] Jackson v. Winne, 7 Wend. 47 (N. Y.); Smith v. Smith, 51 Mich. 607; Bishop, Mar. & Div., § 212.

[29] Kent, Com., 77. "Caveat emptor is the harsh but necessary maxim of the law. Love, however indispensable in an esthetic sense, is by no means a legal essential to marriage; simply because it cannot be weighed in the scales of justice. So, too, all such matters are peculiarly within the knowledge of the parties themselves, and they are put upon reasonable inquiry." Schouler, Dom. Rel., § 23. In Lewis v. Lewis, 44 Minn. 124, it is held that

The marriage relation is fraught with so much of public concern that the law refuses to permit an avoidance except on very potent grounds. Therefore, the fraud alone will not avoid it, even where the fraud is of a nature involving the chastity of the wife before her marriage.[30] However, where the fraud is such as operated to introduce into the family a child not the child of the husband, it is sufficient ground for avoidance,[31] though the English cases do not consider even this a ground for avoiding the marriage, because it did not go to the substance of the contract, but went merely to the inducement.[32] However, it seems clear that where the husband knew of the condition of the woman at the time of his marriage, but mistakenly believed that he was the guilty cause thereof, he could not afterwards annul the marriage on the discovery that, as a matter of fact, he was not the father, or could not have been the father of that child.[33]

In those cases where the fraud or duress is such as entitles the deceived party to avoid the marriage, as soon as the party wronged has learned of the fraud, or is freed from the constraint, he or she may disaffirm the marriage. However, if the wronged party continues to cohabit with the other after learning of the wrong, that will affirm the marriage and make it binding.[34]

concealment by a woman that she was a kleptomaniac was no fraud as to essentials. See Todd v. Todd, 149 Pa. St. 60.

[30] Leavitt v. Leavitt, 13 Mich. 452.

[31] Allen's Appeal, 99 Penn. 196.

[32] Moss v. Moss, (1897) P. Div. 263 (Eng.).

[33] States v. States, 37 N. J. Eq. 195.

[34] Scott v. Shufeldt, 5 Paige 43 (N. Y.).

Error, to invalidate a marriage, must reach the essentials, and one marrying a poor person believing the party to be rich is nevertheless bound. But where another individual is substituted for the one actually accepted, or a person is unwittingly entrapped into a marriage ceremony, such marriage may be repudiated.[35] Marriage partakes of the nature of a contract in that it requires a meeting of the minds. The parties must intend to consummate it, otherwise there is no marriage.

73. **Proper celebration of the marriage.**—By the common law, marriage being a civil contract founded upon the consent of the parties, no legal forms or religious solemnities were required, and no special mode of proof.[36] Schouler thinks that hatred of Popish ceremony and ritualism, which treated marriage as a sacrament, accounts in part for the civil contract theory of marriage.

Hence at common law and in the absence of civil requirements a marriage might result without formalities, or at least other than those required of the parties as evidence of their assent to the marriage contract.[37] Two ways are specified for giving this assent: First, *per verba de præsenti,* as "I do take you for my wife" and "I do take you for my husband," with or without immediate cohabitation; second, *per verba de futuro, cum copula,* as, "I will take you for my wife (or husband) in the future," followed by cohabitation. In the latter case the

[35] Bishop, Mar. & Div., § 204; Clark v. Field, 13 Vt. 460; McClurg v. Terry, 21 N. J. Eq. 225.

[36] 6 Kent, Commentaries, pp. 86-87.

[37] Dyer v. Brannock, 66 Mo. 391; Hutchins v. Kimmell, 31 Mich. 126.

copula is no part of the marriage, but may serve to some extent as evidence of it.[38] At any rate, the public policy element in favor of a marriage relation existing would seem to enter more strongly where there is copula.

Words of present agreement to become husband and wife, the assent being evidenced by certain formalities, and followed by sexual connection, create the marriage relation: first, by the law of nature;[39] second, by the canonical law prior to the Council of Trent;[40] third, by the English common law;[41] fourth, by the decision of the United States

[38] Port v. Port, 70 Ill. 484.

Note.—Illinois Revised Statutes, 1911, chap. 89, p. 1513. § 4. Marriages may be celebrated either by a minister of the gospel in regular standing in the church or society to which he belongs, by a judge of any court of record, by a justice of the peace, by any superintendent of any public institution for the education of the deaf and dumb in this state, or if the parties or either of them, are members of the religious society known as Friends or Quakers, they may lawfully be married by making know (known) their intentions to marry to a standing committee of any official meeting at least one week before such marriage is consummated, and by appearing in a public meeting or private gathering before official witnesses of said body, with a certificate duly setting forth the names and residence of each contracting party, and of the parents of each, if living, which said certificates shall be signed by the contracting parties and the official witnesses and shall be publicly read by one of the witnessing parties, and afterwards duly recorded upon the records of an organized meeting of said society: *Provided, however,* that all marriages commonly known as "common law marriages" hereafter entered into shall be and the same are hereby declared null and void unless after the contracting and entering into of any such common law marriage a license to marry be first obtained by such parties who have entered into such common law marriage and a marriage be solemnized as provided by this act in the same manner as is provided for persons who have obtained a license to be joined in marriage and are about to be joined in any such marriage. And any children born to parties who have entered into such common law marriage shall be and are deemed legitimate upon the parents' having obtained a license to marry and are married in the manner provided in this act.

[39] Turner v. Meyer, 1 Hag. Con. 216 (Eng.).

[40] Dalrymple v. Dalrymple, 2 Hag. Con. 54 (Eng.).

[41] Queen v. Millis, 10 C. & F. 534 (Eng.).

Supreme Court;[42] fifth, by the law of sovereign states.[43]

In a few states it is held that mere verba de futuro, though followed by cohabitation, do not constitute a valid marriage.[44] But as a rule nothing is necessary to create the status of marriage save the simple agreement of two marriageable persons to become husband and wife, the status being assumed at the time of the assent.[45]

74. **Same subject—Statutory formalities.**—Though by the law of nature and reason there is no need of marriage formalities beyond the evidenced assent of the parties, yet, by statute, formalities may be required and made necessary to a valid legal marriage. Peculiar forms and ceremonies have characterized marriages among all nations, and these, though as dissimilar as can be imagined, have tended to become religious in character. The ecclesiastics, who have had a controlling influence in many English laws, have from the first sought to strengthen their own influence by making this universal relation strictly a church function. The Lord Hardwicke Act of 26 Geo. II was to annul the common law which ran counter to the desires of ambitious churchmen, and provided that all marriages should be solemnized in a parish church, with previous publication of the banns, and unless so solemnized were void, unless a special license had been granted. The harsh act was subsequently amended to allow a civil

[42] Meister v. Moore, 96 U. S. 76.
[43] Hutchins v. Kimmel, 31 Mich. 126.
[44] Cheney v. Arnold, 15 N. Y. 345; Peck v. Peck, 12 R. I. 485.
[45] Bishop, Mar. & Div., § 227.

ceremonial before a register. This law, though not a part of our common law, has so moulded statute and custom as to make either a church or a civil marriage, before a designated officer, the usual marriage celebration.[46]

In 1844 the question whether a common law marriage without religious ceremony was valid, went to the House of Lords and resulted in an equal division.[47] And the Supreme Court of the United States divided upon the same question.[48] But the generality of the state courts have upheld the informal marriage against even legislative provisions for a formal celebration. And the Supreme Court, endeavoring to harmonize the rules of the states and recognizing marriage as a matter of common right, decided in Meister v. Moore,[49] that unless the local statute which prescribes regulations for the formal marriage ceremony positively directs that marriages outside of its provisions shall be deemed void, the informal marriage by words of present promise must be pronounced valid, though the statute is contravened.[50]

The necessity of formalities to the validity of the marriage ceremony depends upon the law of the state or country where the marriage is contracted. To decide whether in a given state formalities are essential, reference must be made to the primary laws and to the statute laws. If the primary laws

[46] Schouler, Dom. Rel., § 28.
[47] Queen v. Millis, 10 C. & F. 534 (Eng.).
[48] Jewell's Lessee v. Jewell, 1 How. 219 (U. S.).
[49] 96 U. S. 76.
[50] Schouler, Dom. Rel., 5th ed., § 29.

require no formalities, a statute requiring formalities will not be held to affect the validity of a marriage executed without them, unless it expressly refers to such formalities, and expressly makes their omission invalidate the marriage.[51]

So where a state forbids solemnization without a license, yet in the absence of a clause of nullity, the marriage without it is valid.[52] But the person solemnizing such marriage may be subjected to a penalty.[53]

75. **Same subject—Consent of parents.**—Lord Hardwicke's Act, referred to in the previous section, made the marriage of minors void unless with the consent of parents or guardians. This provision was so intolerable that Gretna Green marriages became the rule, and the act was so modified as to allow the marriage to be valid, although forbidden. And as a general rule in the several states a marriage of minors without parental consent, even though this is required by statute, is valid, but may be revoked by the parties for lack of capacity, as we have seen in a previous section.[54] Runaway marriages of minors are discouraged by inflicting penalties upon the clergymen or magistrates who solemnize such marriages, but the marriage itself, when properly consummated, is valid.

76. **Foreign marriages.**—As a matter of comity among nations, a marriage, valid where celebrated,

[51] 1 Robertson, Eccl. Law, 304.

[52] Cannon v. Alsbury, 1 A. K. Marsh. 76 (Ky.); Stevenson v. Gray, 17 B. Monr. 193 (Ky.).

[53] Bishop, Mar. & Div., §§ 283-287.

[54] Schouler, Hus. & Wife, § 36; Bishop, Mar. & Div., §§ 341-347.

is valid everywhere; second, as regards capacity to qualified to this extent: First, as to matter of ceremony or form, a marriage valid where entered into is valid everywhere; second, as regards capacity to marry, some jurisdictions hold that the parties must satisfy the law of their domicile; third, where the domicile of the parties is not the same, the courts of the domicile of one will sustain the marriage, though the other party be disqualified by the law of his or her domicile.[55] As stated by some writers, this rule that a marriage valid where contracted is valid everywhere applies though the parties intend to evade local statutes, except in incestuous or immoral marriages, which must satisfy the statutes of the domicile.[56] In State v. Kennedy, 76 N. C. 251, where a negro and a white person, living in North Carolina, went into another state and were married to evade the law which prohibited such a marriage, the marriage was held void, though valid by the laws of the state where contracted. And the marriage of an Englishman to his deceased wife's sister in Denmark, where such a marriage is valid, was held void in England.[57]

77. **The family.**—The most important incident of the marriage relation is the establishment of a group unit which is called the family. The very word family denotes, in its ancient significance, a group assembled around an altar for religious service.

[55] Sottomayer v. DeBarros, 3 P. Div. 1 (Eng.); State v. Ross, 76 N. C. 242; Williams v. Williams, 5 Iredell 535 (N. C.). Contra: Thorp v. Thorp, 90 N. Y. 602.

[56] See Browne, Dom. Rel., 12, 13; Schouler, Dom. Rel., § 32.

[57] Brook v. Brook, 9 H. L. 193 (Eng.).

These services being conducted by the father or husband, he naturally came to be called the head of the family. In the Roman and Hindoo societies the family became a more complicated group than in modern society. The patriarchal family consisted of wife, children, children's children and slaves, all held together by subjection to the despotic authority of the eldest male of the eldest ascending line, being the father, grandfather, or even more remote ancestor.[58]

Among most ancient societies women were not extended the privileges and immunities of the men, and a woman was first subjected to her father's will, and, when married, to that of her husband. By the common law the family is treated as a unit, and for all practical purposes the husband is the ruler. Blackstone says: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything; and is, therefore, called in our law-French a femme-covert; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture." In carrying out this legal fiction the husband was invested with many powers over the property and even the person of the wife; was considered incapable of granting anything directly to his wife or entering into a cove-

[58] Maine, Early History of Institutions, p. 310; Coulanges, Ancient City.

nant with her; and was made responsible for her debts, frauds, or torts, before or after marriage. For crimes committed before marriage the wife was responsible; but for crimes less than treason or murder, committed after marriage in the husband's presence or at his command, she was not responsible, as they were presumed to be done by coercion. Some of these provisions were doubtless for the protection and benefit of the wife, as Blackstone claims.[59]

The common law doctrine in regard to husband and wife has not stood intact, nor has the legislation of sovereign states been uniform in fixing the rights, duties, and liabilities of married parties to each other and the public. It will be the purpose in the succeeding sections to consider briefly the modifications of the common law, whether in equity or by statute.

78. **Mutual duties.**—The wife is to love, honor, and obey the husband, and he is to love, cherish and protect his wife, and deliver her from insult and treat her kindly. The husband undertakes to furnish his wife a suitable home, and maintain her according to his means and condition, and provide for their offspring; having done this, his authority over the wife is admitted, and her wishes must yield to his. Modern statutes enlarging the wife's property rights do not deprive the husband of his authority as head of the house.[60]

The husband's surname is conferred upon the wife, and she retains it until either she is divorced

[59] 1 Blackstone, Commentaries, p. 445.

[60] Oliver v. Oliver, 1 Hag. Con. 363 (Eng.); Tyler v. Sanborn, 128 Ill. 136.

with restitution of name, or until, being widowed, she marries again, or until she acquires a new name by reputation.[61]

79. **Domicile.**—A marriage implies a home and the general obligation of the parties to live there together. The husband, as head of the family, provides the home, and it is the duty of the wife to live there with him, and his domicile determines hers.[62] But the wife may obtain a separate domicile for the purpose of obtaining a divorce. If the husband abuses his wife, or makes the home unfit for a respectable woman to live in, she may leave him.[63] So the wife need not follow her husband into banishment or to prison, and a temporary separation, made necessary by the husband's trade or calling, is no breach of the marital duties.[64]

The husband is not justified in ordering his wife to follow him on a long or perilous journey, or into an unsafe country. And in general any cause justifying divorce will justify the innocent party leaving the home of the other.[65] The wife on her part is not justified in making the husband's life miserable by reason of her violent and outrageous behavior. Such conduct may justify him in leaving her, but will not sustain an action for divorce.[66]

The marriage of an alien woman to a citizen of the United States makes her a citizen of the United

[61] Fendall v. Goldsmid, 2 P. Div. 263 (Eng.).
[62] Greene v. Greene, 11 Pick. 410-415 (Mass.).
[63] McCormick v. McCormick, 19 Wis. 172.
[64] Schouler, Dom. Rel., § 35; Browne, Dom. Rel., 16.
[65] Boyce v. Boyce, 23 N. J. Eq. 337; Powell v. Powell, 29 Vt. 148.
[66] Lynch v. Lynch, 33 Md. 328.

States and a partaker of all the advantages conferred by the laws of the husband's domicile.[67] This rule becomes more significant as woman suffrage assumes greater proportions throughout the land.

80. **Mutual rights of society and companionship.** —The husband and wife are each equally entitled to the society and companionship of the other.[68] The common law gives the right of action for damages against any person enticing away one spouse or inducing him or her to live apart from the other.[69] But the action of the defendant must have been malicious, or from improper motives; and parents and near relatives are treated more considerately than mere strangers in this respect, and are entitled to shelter and protect the wife leaving her husband for cause, but must give her up whenever she wishes to return to her husband. Schouler states the legal doctrine to be, that honest motives may shield a parent from the consequences of indiscretion, while adding nothing to the right of actual control—the intent with which the parent acted being the material point, rather than the justice of the interference; that a husband forfeits his right to sue others for enticement, where his own misconduct justified and actually caused the separation, but that otherwise his remedy is complete against all persons whomsoever who have lent their countenance to any scheme for breaking up his household.[70] An action for debauchery or enticement with bad mo-

[67] Luhrs v. Eimer, 80 N. Y. 171.
[68] Hutcheson v. Peck, 5 Johns. 196 (N. Y.).
[69] Modisett v. McPike, 74 Mo. 636; Westlake v. Westlake, 34 Ohio St. 621.
[70] White v. Ross, 47 Mich. 172.

tives may accrue without the wife's actually leaving the house.[71]

The action by the wife for the enticement of her husband was undeveloped at the old common law, and while now quite generally admitted, is opposed in a few states.[72]

81. **Support and service.**—The husband is bound to provide the family support and means of living, and the wife for her part must render such services as are incident to the care of the house and its contents; the one is equivalent of the other, and the wife is not entitled to compensation for taking care of an insane husband.[73]

The support which the husband is to furnish includes food, clothing, lodging, medical attendance, and the like, suitable to his condition in life and his income. Mere inability to support, provided there is no unkindness or indifference, is not a ground for divorce.[74] Nor is his saving and frugal disposition, when he could afford to be liberal.[75]

As an incident to his duty to support the household the husband has the right to prescribe rules for the conduct of the house and the regulation of expenses. He is also entitled to choose the persons who shall share the hospitality of his home, even if

[71] Rinehart v. Bills, 82 Mo. 534.

[72] Duffies v. Duffies, 76 Wis. 374; Doe v. Roe, 82 Me. 503. See Note to Schouler, Dom. Rel. (5th ed.), § 41.

[73] Grant v. Green, 41 Ia. 88. "The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able." (Rev. Stat. Ohio, § 3110.)

[74] Skean v. Skean, 33 N. J. Eq. 148; Bruner v. Bruner, 70 Md. 105.

[75] Runkle v. Runkle, 96 Mich. 493.

he restricts the guests to those alone who are agreeable to him.[76] And by the early common law the husband could moderately chastise the wife.[77]

82. **Husband and wife as witnesses.**—By a rule of the common law husband and wife cannot be witnesses or testify for or against each other, and this is true though both parties consent. And the rule holds after the dissolution of the marriage by death or divorce.[78]

Blackstone bases the rule on the unity of the spouses; other writers find the reason of the rule to be that public policy requires that the marital relation, which demands unlimited confidence between the spouses, be protected by law, and that confidence of the parties in each other be encouraged by the assurance that it may not be divulged, willingly or unwillingly.[79]

But modern statutes have to some extent changed this rule, and a husband may be a witness in reference to transactions concerning his wife's separate property, as here they have separate interests to maintain.[80] And by statute husband and wife are

[76] Evans v. Evans, 1 Hag. Con. 115 (Eng.); Fulton v. Fulton, 36 Miss. 517; Schouler, Dom. Rel., § 46.

[77] 1 Blackstone, Commentaries, pp. 444, 445.

[78] 1 Greenleaf Ev., § 340.

[79] 1 Blackstone, Commentaries, p. 443; 2 Kent, Commentaries, 178; 1 Greenl. Ev., § 254.

[80] Illinois R. S., 1911, chap. 51, p. 1156. § 5. No husband or wife shall by virtue of § 1 of this act, be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases

made competent as witnesses in behalf of each other in all criminal cases, or in suits for cruelty to minor children, provided they do not testify concerning any communication made or act done during coverture. So where the conversation between husband and wife was in the presence and hearing of a third party the confidential nature ceases and either party may testify.[81] They are also allowed to testify in proceedings for divorce.[82] The statutes changing the common law rule are not harmonious and must be examined.[83]

where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this act: *Provided,* that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife.

[81] Sessions v. Trevitt, 39 Ohio St. 259.

[82] Rev. Stat. Ohio, §§ 7284, 5697.

[83] Bitner v. Boone, 128 Pa. St. 567; Blanchard v. Moors, 85 Mich. 380.

CHAPTER VIII.

EFFECT OF MARRIAGE ON THE PROPERTY RIGHTS OF THE PARTIES.

83. **At common law—Wife's real estate.**—At common law, the wife upon marriage lost her identity so that she became during marriage unable to contract concerning her property except in conjunction with her husband. Upon marriage the husband, therefore, being the sole person who could contract for the wife, became entitled to control her real estate and was entitled to take the rents and profits thereof and appropriate them to his own use.[84] On the death of the wife this right of the husband to enjoy the rents and profits of his wife's real estate terminated and the property passed to the wife's heirs, subject to this provision, however: If, during the marriage, a child was born alive, regardless of how long that child remained alive, the husband became entitled, on the death of the wife, to what was called an "estate of curtesy." This estate gave him the right to all the wife's real estate for his life with the right of full enjoyment to the exclusion of everyone else.[85]

84. **Same subject—Wife's personal estate.**—The rule at common law was that the goods, i. e., money and furniture, in the actual possession of the wife

[84] A. V. Dicey, Law and Public Opinion in England, p. 370, note 2.
[85] Ibidem.

at the time of the marriage, became the absolute property of the husband. In other words, the mere solemnization of marriage, of itself, operated to vest the title to them in the husband. The wife's choses in action, i. e., the debts due to her, and all claims that she had of whatsoever nature, remained the property of the wife, unless (or until) her husband reduced them to possession. What constitutes a reducing to possession will be considered a little further on.

The wife's paraphernalia, i. e., the articles of wear and personal adornment, remained hers, but the husband could dispose of it during his life and in that case the proceeds belonged to him, or his creditors could subject it to their claims, but the husband could not by will dispose of it. In one case while the court permitted the husband's creditors to subject the paraphernalia of the wife to the husband's debts, still it was held, that the wife could obtain reimbursement therefor in equity from the real and personal estate of her husband.[86]

So, too, the wife's chattels real, i. e., the leasehold estates that she owned, remained her property, but the husband might likewise dispose of them during marriage, in which event the proceeds were his; or he might give them away at his pleasure.[87]

85. **Same subject—Choses in action.**—As to choses in action, the husband had to reduce them into possession before they were divested out of the wife's estate. That means that he had to exercise

[86] Howard v. Menifee, 5 Ark. 668.
[87] Riley's Adm. v. Riley, 19 N. J. Eq. 229.

control over them, indicating that he availed himself of his election to take them. Thus where the chose was a debt due the wife, the simplest way to reduce that, would be by collecting the debt. However, the husband might accept a new note or evidence of indebtedness running to himself. In one case, the chose consisted in the right the wife had in her father's estate as distributee. The wife died before the money was paid over, and it was held that the husband had never reduced the chose to his possession.[88] It is to be remarked, however, that where the old common law rule prevails, the husband would become entitled anyway where he administers his wife's estate, as the common law gave the administrator all the residue of the estate after payment of debts. That, however, has been almost universally changed by statute.

Where the husband compels the wife to live separate and apart from him, it seems that the rule is changed, provided the separation is permanent, and in that case if the wife is unprovided for by the husband according to her station in life, she may, it seems, even at common law, acquire property, control her person and her acquisitions, and contract, sue and be sued in relation to them, during the continuance of that condition, as fully as if she were unmarried.[89] This is a rule of necessity and arises from the exigencies of the circumstances.

86. **In equity—Real estate—Personal estate.**—Inasmuch as the rule in equity in the early times

[88] Leakey v. Maupin, 10 Mo. 368.
[89] Love v. Moynehan, 16 Ill. 277.

made no distinction between real and personal estate, no distinction shall be made here.

While the law side of the courts was very harsh in the application of the rules of law governing the property of the married woman, equity from very early times granted relief. Dicey in his Law and Public Opinion in England, pp. 373-375, says: "In 1800 the Court of Chancery had been engaged for centuries in the endeavor to make it possible for a married woman to hold property independently of her husband, and to exert over this property the rights which could be exercised by a man or an unmarried woman. Let it, however, be noted, that the aim of the Court of Chancery had throughout been not so much to increase the property rights of married women generally, as to enable a person (e. g., a father) who gave to, or settled property on a woman, to ensure that she, even though married, should possess it as her own, and be able to deal with it separately from, and independently of, her husband, who, be it added, was, in view of equity lawyers, the 'enemy' against whose exorbitant common-law rights the Court of Chancery waged constant war. By the early part of the nineteenth century, and certainly before any of the Married Women's Property Acts, 1870-1893, came into operation, the Court of Chancery had completely achieved its object. A long course of judicial legislation had at last given to a woman, over property settled for her separate use, nearly all the rights, and a good deal more than the protection, possessed in respect of any property by a man or a feme sole.

This success was achieved, after the manner of the best judge-made law, by the systematic and ingenious development of one simple principle—namely, the principle that, even though a person might not be able to hold property of his own, it might be held for his benefit by a trustee whose sole duty it was to carry out the terms of the trust. Hence, as regards the property of married women, the following results, which were attained only by degrees.

"Property given to a trustee for the separate use of a woman, whether before or after marriage, is her separate property—that is, it is property which does not in any way belong to the husband. At common law indeed it is the property of the trustee, but it is property which he is bound in equity to deal with according to the terms of the trust, and therefore in accordance with the wishes or directions of the woman. Here we have constituted the 'separate property,' or the 'separate estate' of a married woman.

"If, as might happen, property was given to or settled upon a woman for her separate use, but no trustee were appointed, then the Court of Chancery further established that the husband himself, just because he was at common law the legal owner of the property, must hold it as trustee for his wife. It was still her separate property, and he was bound to deal with it in accordance with the terms of the trust, i. e., as property settled upon or given to her for her separate use."

It will thus be seen that without any legislation equity distinguished between the property that a

wife had at the time of marriage, and what she acquired subsequently for her separate use. It was necessary, however, that the property be (a) given to a trustee for the use of the married woman, or (b) given to her for her separate use. Otherwise equity could do nothing but follow the rules at law. Still, it appears that if the property is given charged to the separate use of the woman, it is immaterial whether given before or after marriage.

Having gone thus far, equity went further. Cases arose where the husband or his assignees found it necessary to go into equity to reach some of the property of the wife. Thus where the wife had an interest in some trust estate, or a part interest in some claim or in a debt due someone else, it was necessary for the husband to go into equity as for an accounting, or an adjusting of the different rights in the claim in which the wife's right was only a part. Where the husband or his assignees went into equity for that purpose, equity might refuse to give any assistance until an adequate provision was made for the wife out of that property. For the right to have equitable relief was not a positive one, but all rested in the discretion of the court.

Very soon equity went still further and permitted the wife to originate the proceeding in equity for a settlement upon herself out of that property. That was called "The Wife's Equity to a Settlement." The court would not, of course, interfere where the husband could completely enforce his rights at law without the aid of equity or where the property was not already within the reach of the

court of equity or under its immediate control or in its custody.[90]

This right of the wife to enforce her right in equity where property was settled to her separate use, was personal to her and, it seems, died with her. Thus in a case[91] where the parties before marriage entered into a marriage settlement agreement, where the wife died before the husband, the wife's next of kin were not entitled to the property.

87. **Under statute.**—The early married woman's legislation was a distinct advance, even, on the effect of the very liberal rules of equity.[92]

Under this type of statute it was held that on the death of the wife, the property went to her next of kin. Attention is called to the fact that while in equity a woman could keep her separate estate free from the debts of her husband, as was seen above, at common law, and even in equity, it did not pass to her next of kin at her death. To that extent this early legislation changed her condition.[93] The cases went so far as to hold that under this type of statute a married woman could lease her own real estate with-

[90] 3 Pomeroy, Equity Jurisprudence (3rd ed.), § 1114.

[91] Proudley v. Fielder, 2 Mylne & K. 57 (Eng.).

[92] Laws of Ill. 1861, p. 143: "All the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

[93] Southard v. Plummer, 36 Me. 64.

out her husband joining,[94] though it seems she could not convey her real estate alone. Having leased the property, she could, under such statutes, collect the rent.[95]

Following is a sample of the modern legislation. At this place, however, we shall make no comments on this except to point out that it gives the married woman all the powers that her husband has.

Revised Statutes of Illinois, 1874, c. 68, § 9: "A married woman may own, in her own right, real and personal property obtained by descent, gift or purchase; and manage, sell and convey the same to the same extent and in the same manner that the husband can property belonging to him. * * *"

88. **Earnings, services and society—The husband's right at common law.**—At common law, if the wife was injured in an accident, two causes of action arose, one in favor of the wife for her pain and suffering and for what is considered injury to the person, the other in favor of the husband for the loss of the wife's capacity to render services, or of her earning capacity, and the loss of her society. As to the former, it was necessary for the husband to join with the wife, as she could not sue alone, she being, at common law, a part of the husband, her individuality having been merged in that of the husband by marriage.[96] As to the latter, the husband sued alone, because he was entitled to services, earnings and society of the wife, and it was improper to join her in

[94] Parent v. Callerand, 64 Ill. 97.
[95] Woodward v. Woodward, 148 Mo. 241.
[96] Smith v. St. Joseph, 55 Mo. 456.

an action brought by him therefor.[97] At this juncture will be considered the husband's right to sue on his own account for injury to the wife. Generally this is governed by somewhat the same rules as govern the parent's right to recover for injury to the child, except that the husband's loss includes, in addition to that of service and earnings, also loss of society and loss of consortium; the parent's loss being only of service and earnings. Thus recovery might be had for future loss of services and earnings accruing after the trial.[98] But if the wife is dead before the action is brought, recovery is limited to damages accruing to the husband before her death, and no prospective damages for loss of service which would probably have been rendered had she lived, or earnings which might have been earned, can be recovered;[99] so that where the wife is instantly killed, no cause of action at all arises in favor of the husband,[1] in the absence of some statute expressly saving it. As was seen in the treatment of the subject under Parent and Child, some jurisdictions have adopted the opposite rule.[2] The real difficulty arises, however, as to the husband's right of recovery for loss of the wife's society or consortium.

The claim of loss of society or consortium does not commonly arise in simple action for personal injuries to the wife, though where the wife is by reason

[97] Buckley v. Collier, 1 Salk. 114 (Eng.).

[98] Hopkins v. Atl. & St. L. Ry., 36 N. H. 9; Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778.

[99] Hyatt v. Adams, 16 Mich. 180; Mowry v. Chancy, 43 Iowa 609.

[1] Green v. Hudson River Ry. Co., 2 Abb. Dec. 277 (N. Y.).

[2] Cross v. Guthery, 2 Root 90 (Conn.).

thereof compelled to sojourn in a hospital, the claim may arise. The great mass of cases where it does arise, is where the affections of the wife have been tampered with, and here we will discuss, first, cases where criminal conversation has been had with the wife. The question at once arises, how will damages be proved from the fact of such criminal conversation, and the answer is that loss of consortium is presumed by the law from the fact of such acts and damages will follow as a matter of law, to be fixed by the jury.[3] This leaves the damages largely to the caprice of the jury called in the case.

Suppose now that the complaint is not that the wrongdoer had criminal conversation with the wife but that he merely alienated the affections of the wife from the husband. In these cases the test is, has the third person committed any active step to spirit the wife away? The mere fact that he has ingratiated himself into the good graces of the wife so that she has conceived a liking for him, is not enough to give the husband grounds of action against him, so long as there was no adultery or seduction, so long as he did not entice the wife away from the husband, or so long as he is not harboring and concealing the wife from the husband. The rule is the same where the wife sues another woman.[4] If, however, the third person induced the wife to leave and stay away from the husband, that is enough, even if the inducement takes the form of friendly advice intended and in good faith believed to be for the wife's

[3] Bigaouette v. Paulet, 134 Mass. 123.
[4] Houghton v. Rice, 174 Mass. 366.

own good.[5] An exception exists, it seems, where the parents, for the daughter's own good, as where they believe, on reasonable grounds, that the continuance of the marriage relation will tend to injure the daughter's health or destroy her peace of mind, advise her to leave her husband. In such cases the husband has no action against them.[6] One jurisdiction holds that even a third person is not liable where his act is only to advise and where he believes honestly and truthfully that it would be best for the wife to leave.[7] This case proceeds on the theory that where the third person's act ends with mere advice, the real cause of the leaving is the wife's own volition.

89. **Same subject—Under statute.**—Under the early married woman's acts, such as the Illinois Act of 1861 (see above), profits from a millinery business of the wife, her earnings, etc., belonged to the husband, and the husband's creditors might subject them to the debts of the husband.[8] A scrutiny of that act will disclose that it mentions the wife's personal property, but not her earnings; earnings being still, as at common law, the property of the husband. In 1869, an act was passed in Illinois, allowing the wife her earnings apart from the husband. That, of course, changed the common law rule in that regard.

Under an act in Pennsylvania as follows: "'Hereafter a married woman may, in the same manner

[5] Hartpence v. Rodgers, 143 Mo. 623.
[6] Oakman v. Belden, 94 Me. 280.
[7] Tasker v. Stanley, 153 Mass. 148.
[8] Jassoy v. Delius, 65 Ill. 469.

and to the same extent as an unmarried person, make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section' (§ 1), but she may not become accommodation indorser, nor execute a deed without joining her husband," it was held [9] that the earnings of the wife were her separate property free from the debts of the husband.

The question then arises, is a husband, under the statutes giving the wife control of her own earnings,[10] bereft of all right of suing a railroad company, on behalf of himself, for loss of services due to an injury to her at the hands of the company, assuming that the injury caused no loss of consortium? At common law, some loss of service was presumed from the fact of the marriage, but under these statutes, it seems, the rule is different. Thus the husband was under such a statute bound to show by proof that such relations actually existed between him and his wife as to indicate that the husband was entitled to her services.[11]

Can the husband under these statutes recover for loss of consortium? It was held that he might.[12] The Massachusetts court held the right was not expressly taken away by statute, and as the act, so far

[9] Muding v. Urich, 169 Pa. 289.

[10] Laws of Ill. 1869, p. 255: "A married woman shall be entitled to receive, use and possess her own earnings, and sue for the same in her own name, free from the interference of her husband or his creditors: Provided, this act shall not be construed to give to the wife any right to compensation for any labor performed for her minor children or husband."

[11] Atchison, T. & S. F. R. R. Co. v. Dickey, 1 Kans. App. 770.

[12] Kelley v. N. Y., N. H. & H. R. R., 168 Mass. 308.

as it was in derogation of a common law right, would be strictly construed, it could not be presumed that it was the intention to take away this right. As suggested above, however, there was doubt whether an action lay even at common law for loss of consortium because of injury from a railroad accident, and in a later case[13] of the same jurisdiction, it was held that this right existed only in cases of criminal conversation, or alienation, and that in personal injury cases the injury was not the proximate cause of loss of consortium.[14] Thus we have finally a case[15] which holds that all the husband can recover in personal injury cases, is the cost of medical services for the wife. This is not the general rule, however, the other jurisdictions holding in favor of the right of the husband to recover for loss of consortium.[16]

90. **Same subject—The wife's right.**—Just as the husband could recover damages on the mere showing of seduction of the wife, so the wife could recover on the mere showing of seduction of the husband by another woman.[17] But while, in the case cited, the language of the court goes so far as to hold that mere seduction is enough, a later case[18] in a different jurisdiction points out that there was, in the Massachusetts case, really an enticing away. The Minnesota case concludes that mere seduction of the hus-

[13] Feneff v. N. Y. Cent. & Hudson River R. R. Co., 203 Mass. 278, LEADING ILLUSTRATIVE CASES.

[14] See subject, TORTS, Part VII.

[15] Bolger v. Boston El. Co., 205 Mass. 420.

[16] Lyons v. New York City R. R. Co., 49 Misc. Rep. (N. Y.) 517; Cullar v. Missouri K. & T. Ry. Co., 84 Mo. App. 347.

[17] Nolin v. Pearson, 191 Mass. 283.

[18] Kroessin v. Keller, 60 Minn. 372, LEADING ILLUSTRATIVE CASES.

band by another woman is not enough because, the court says, a woman cannot possibly be the seducer. This apparently is not the weight of authority in this country, however.[19]

91. **Same subject—Emancipation.**—Where the wife is deserted and supports herself, it seems that she may, herself, at common law, sue and recover for loss of time and earnings caused by a personal injury, and also for money expended for medical aid in connection therewith.[20] This was called emancipation of the wife. It was based on the same rule of necessity that entitled her to control her separate property.

92. **Wife's claim for injury to her person.**—Having discussed the husband's right in the wife, it remains to consider the husband's control over the wife's claim for her pain and suffering. At common law, it was seen that the husband had to join the wife in her suits on account of such injuries. It appears, also, that he could himself absolutely release her cause of action for tort to herself.[21] Under the early statutes, the husband still was a necessary party to be joined in a suit by the wife for personal injuries.[22] Under the Illinois Act of 1861 (see above), it was held that such a cause of action was property and so came within the protection of that act and obviated the need of the husband to join

[19] Hart v. Knapp, 76 Conn. 135.

[20] City of Peru v. French, 55 Ill. 317.

[21] Ballard v. Russel, 33 Me. 196.

[22] Laughlin v. Eaton, 54 Me. 156. Under c. 61, § 3, "A married woman may, if she pleases, prosecute suits at law or in equity for the preservation and protection of her property as if unmarried, and may maintain an action in her own name to recover the wages of her personal labor, not performed for her own family."

the wife where she sued upon such cause of action.[23] Another jurisdiction, on the contrary, held that cause of action was not property within the meaning of the act, so that it was necessary for the husband to join.[24]

93. **Antenuptial torts and contracts and postnuptial torts of wife—As to torts—At common law.**—Since the individuality of the wife merged in that of the husband upon marriage, the query at once arises, what became of the claims against the wife for torts and contracts that arose before her marriage? It appears that, at common law, there was no cause of action against the husband by reason of the liability of the wife before marriage; but the liability of the wife continued. However, she could not be sued alone, and the law required that the plaintiff in such cases join the husband as defendant in the suit.[25] Of course, that rendered the husband liable

[23] City of Chicago v. Speer, 66 Ill. 154.

[24] Samarzevosky v. Baltimore City Pas. Ry. Co., 88 Md. 479. In Gustin v. Carpenter, 51 Vt. 585, it was held that a married woman, whose husband was insane and confined in an asylum for insane persons in a state other than that of the woman's residence, may sue in her own name for a wrong personal to herself. In Burger v. Belsley, 45 Ill. 72, at page 75, the court, by Mr. Justice Walker, said: "But having joined with the wife, and brought the suit, or having consented that it might be done, we are at a loss to perceive any reason why he should be permitted to retract. While he may refuse to proceed further and increase his liability for future costs, he surely has no right to have indemnity against those he has voluntarily incurred, or permitted to be made with his consent. His liability in such a case has been incurred, and he has no claim, moral or legal, to have them refunded, or to be indemnified against their payment from his wife. Nor does the law give him the right to impose the terms or conditions, in a case like the present, upon which his wife may seek redress, through the channels of the law, for injuries she may have suffered in her person or property. Nor can the court in the exercise of a discretion impose such terms. The court therefore erred in requiring an indemnity against liability for costs already accrued."

[25] 16 Law Quarterly Review 191, 192.

to a judgment for these claims against the wife, and really rendered the husband liable for them if sued before the marital relation ceased, but he could not be sued after the cessation of the marital relation.

As to the torts of the wife committed during marriage the same rule applied. Of course, during marriage the wife had no power to contract at common law and could assume no contractual liabilities.

94. **Same subject—Statutory changes.**—What effect upon this liability did the early legislation have, such as the Illinois Act of 1861, which gave the wife power and control over her separate property? It seems that as to any causes of action connected with management over and disposition of the wife's separate property, the wife might be sued alone, without joining the husband. Thus where the liability of the wife consisted in a fraud in the sale of her separate property, she could be sued alone therefor, though not where she inflicted damage upon another by a direct act, as by a blow.[26] To illustrate, if she owned a street car line and someone was injured because of the negligent running of the line by her servants, she could be sued alone, under these early statutes; but if she hit another with a bar of iron, her husband would have to be joined.

95. **Same subject—Debts.**—Under the Illinois Act of 1861, it was considered that the husband was not relieved of liability of being joined with the wife in a suit upon a contract made by the wife before her marriage,[27] because, as under that act the hus-

[26] Baum v. Mullen, 47 N. Y. 577.
[27] Connor v. Berry, 46 Ill. 370.

band was still entitled to the wife's earnings, and inasmuch as at common law he was given her earnings because he was so liable, so he must still remain liable under an act that did not take away his right to the earnings. When, then, the Act of 1869 took away his right to the earnings, it also took away this liability for antenuptial debts and contracts of the wife.[28] Under a Kansas act,[29] it was considered that the husband no longer had the right to the wife's earnings and so was not liable to be joined in suit against the wife for a slander.[30]

[28] Howarth v. Warmser, 58 Ill. 48.

[29] "The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise, or bequest, or the gift of any person except her husband, shall remain her sole and separate property notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts." Comp. Laws 1879, c. 62, § 1.

"A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent and with like effect, as a married man may in relation to his real and personal property." c. 62, § 2, supra.

"Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used and invested by her in her own name." c. 62, § 4, supra.

[30] Norris v. Corkill, 32 Kan. 409.

CHAPTER IX.

DUTY OF THE HUSBAND TO SUPPORT WIFE.

96. **Authority of the wife to pledge husband's credit—At common law.**—At common law the wife had no authority to pledge the husband's credit from the mere fact of the marriage relation alone. It was necessary to show an authority either express or implied.[31] The matter of an express authority presents no difficulty. The question is, when was an authority implied?

It was held that no authority is implied (a) merely from the fact of marriage unless there was an abandonment, or (b) from the fact of cohabitation where the wife does not run a household.[32] This implies that where there was an abandonment, the wife could pledge her husband's credit for necessaries, as by an implied authority evidenced by the fact of abandonment. So, also, where the wife had the running of a household, there was an implied authority to pledge the husband's credit for the needs of the household. Even in these cases, however, the implication of authority may be disproved by the circumstances of the case. Thus where the wife was wont to pay for her wearing apparel herself, the husband was not liable therefor unless it was shown that

[31] Lane v. Ironmonger, 13 Mees. & W. 368 (Eng.).
[32] Debenham v. Mellon, L. R. 6 App. Cases 24 (Eng.).

he refused to provide for her.[33] Again though the husband was not ordinarily compelled to furnish necessaries for his wife living apart from him when she lived apart from him by her own fault, the husband was held liable because he had without demurring paid bills she contracted in his name.[34] But it must appear that the tradesman, when he delivered the goods to the wife, intended to look to the husband for payment; and where his books showed that he had charged the wife, he could not, at common law, hold the husband.[35] However, where the husband abandoned the wife it was no defense that he, at a time before the desertion, instructed the tradesman that he would not be liable for necessaries furnished her, for it was presumed that he had not intended this instruction to continue in force after his act of abandonment.[36] While thus it appears that the wife may pledge the husband's credit for necessaries where she lives apart from him through his fault, still where she receives a sufficient allowance from him, she cannot do so.[37] The reason for this is that this right to pledge the husband's credit is one of agency implied from all the circumstances. That agency would not be implied where an allowance was made to the wife. Therefore, the fact that the wife had means of her own, would not in such case rebut the implication of such agency,[38] for the

[33] Dolan v. Brooks, 168 Mass. 350, LEADING ILLUSTRATIVE CASES.
[34] Anthony Cowell & Co. v. Phillips, 17 R. I. 188.
[35] Gafford v. Dunham, 111 Ala. 551.
[36] Bolton v. Prentice, 2 Str. 1214 (Eng.).
[37] Hunt v. Hayes, 64 Vt. 89.
[38] Ott v. Hentall, 70 N. H. 231.

husband's duty to support his wife and failure so to do could not be satisfied short of a showing as to performance on his part. Where, however, the parties separate by mutual consent, no such implication of authority to pledge the husband's credit arises.[39]

So far we have dealt solely with cases where the tradesman has supplied the wife with necessaries and sought to charge the husband therefor. Suppose that a third person, instead of furnishing necessaries, gives her money and this money is by her expended in necessaries. It was found that in the case of infants, except possibly in a court of equity, that would not entitle to a recovery, because money was not of the class of necessaries. So also in the case of husband and wife, it is considered that the implied agency does not extend to borrowing money, even where that is used for the purpose of obtaining necessaries. One case[40] holds that a third person may proceed in the stead of the tradesman by right of subrogation.[41] The better rule is that there can be no such subrogation where the third person advances the money, but that subrogation occurs only where he stands as surety or guarantor of payment by the husband to the tradesman.[42]

97. **Wife's right to sue husband for necessaries.** —Finally the question arises, can the wife sue the husband in the first instance for money or an allowance with which to procure necessaries? At common law, a wife could not sue to live separate and

[39] Eastland v. Burchell, L. R. 3 Q. B. Div. 432 (Eng.).
[40] Kenyon v. Farris, 47 Conn. 510.
[41] See subject, SURETYSHIP and GUARANTY.
[42] Skinner v. Tirrell, 159 Mass. 474.

apart from the husband,[43] and she could not sue him for non-support while living apart from him.[44]

98. **Changes produced by statute.**—Statutes have worked numerous changes. At common law the husband was liable to pay the wife's funeral expenses. Under statutes giving the married woman her separate estate, it was held that he was still liable therefor and, moreover, that one attending to the wife's burial where she was living apart from the husband for his fault, might, notwithstanding such statute, recover from the husband.[45] This seems to be the weight of authority, though there is a contrary rule that permits a husband who has paid for his wife's burial, to recover against her estate for her funeral expenses.[46]

99. **Same subject—Family expense.**—Some statutes[47] provide that husband and wife shall both be responsible for family expenses. As to what are family expenses, it seems undisputed that they are more than necessaries. Any article, in fact, conducive to the welfare of the family generally, and used in the family, comes within the scope of the term, even though used solely by individual members of the family. A ring has been held not to be a family expense. A doctor's carriage was held not to be, though the family rode in it occasionally.[48] In Iowa, the shirt stud worn by the husband was

[43] Trotter v. Trotter, 77 Ill. 510.
[44] Decker v. Kedly, 148 Fed. 681.
[45] Smyley v. Reese, 53 Ala. 89.
[46] Constantinides v. Walsh, 146 Wallis 281 (Irish).
[47] Hyman v. Harding, 162 Ill. 357, LEADING ILLUSTRATIVE CASES.
[48] Staver Carriage Co. v. Beaudry, 138 Ill. App. 147.

held to be family expense because, as distinguished from a ring, it was a part of his wearing apparel.[49] The rent of a house was family expense, so long as the family occupied the premises. A family expense must be for a benefit enjoyed by the family, however, and therefore damage to furniture leased together with the house, is not within the meaning of the term.[50] So, also, in order to constitute such an expense, the husband and wife must live together;[51] and while the expense need not ordinarily be for a necessary, it must be such when incurred by one spouse against the wishes of the other, if that fact was communicated to the tradesman.[52] It is to be noted, that the mere contract by one spouse for articles that would come within the class of family expense, does not bind the other spouse until the goods are actually delivered and received for use in the home. Thus the term does not include money borrowed to pay for articles,[53] though the articles themselves be such that if purchased on credit by either spouse, the other would be liable for them as for family expense.

[49] Neasham v. McNair, 103 Iowa 695.
[50] Straight v. McKay, 15 Colo. App. 60.
[51] Gilman v. Matthews, 20 Colo. App. 170.
[52] Haggard v. Holmes, 90 Iowa 308.
[53] Sherman v. King, 51 Iowa 182; Davis v. Ritchey, 55 Iowa 719.

CHAPTER X.

CONTRACTS OF MARRIED WOMEN.

100. **At common law.**—Inasmuch as the theory of the common law was that marriage merged the legal identity of the woman into that of the husband, contracts of a married woman were absolutely void.[54] Thus a married woman's contracts could not at common law be ratified after her disability of coverture was removed, i. e., where her husband died, or she was divorced.[55] An infant's contracts, except those appointing an agent, were subject to be ratified after the infant became of age, but this was not true of married women's contracts. Even where the husband had wilfully deserted his wife and left the country, her contracts were still absolutely void, though where the husband had abjured the realm, i. e., renounced the country, or was banished, exiled or transported therefrom, the rule was different.[56] Some authorities have relaxed the sternness of this rule, and render the contracts of a married woman valid where the husband has positively deserted the wife.[57]

101. **In equity.**—While equity did not and could

[54] Lee v. Lanahan, 59 Me. 478.

[55] Lloyd v. Lee, 1 Strange 94 (Eng.); Rawlins v. Neal, 126 N. C. 271, 35 S. E. 597; Ruppel v. Kissel, 74 S. W. 220; Gilbert v. Brown, 123 Ky. 703, 97 S. W. 40, 29 Ky. Law Rep. 1248, 7 L. R. A. (N. S.) 1053.

[56] Robinson v. Reynolds, 1 Aiken 174 (Vt.).

[57] Prescott v. Fisher, 22 Ill. 390; Gregory v. Pierce, 4 Met. 478 (Mass.).

not give a married woman contractual powers, it did enable her to incur a debt on the credit of her separate estate in equity and rendered such separate estate liable to satisfy the debt. However, she could not bind any property that she did not have at the time of incurring the obligation, not even where she expressly attempted to subject property in expectancy.[58] Thus a solicitor was entitled to have his fees paid out of a married woman's separate estate in equity, and it was considered that an express intention to charge such property was presumed from the fact that the woman employed him, even though the employment was by parol.[59] This rule has been discountenanced, it seems, by later decisions, which require that in order to charge her separate estate in equity by a contract, the woman must by express words signify her intention to charge her separate estate.[60] In the case cited the wife was surety for her husband, but made no agreement that her separate estate be charged, and it was held that it could not be subjected to liability on account of this obligation as surety, that the woman had entered into.[61]

[58] A. V. Dicey, Law and Public Opinion in England, pp. 379, 380.

[59] Murray v. Barbe, 3 Mylne & K. 209 (Eng.).

[60] Yale v. Dederer, 22 N. Y. 450, LEADING ILLUSTRATIVE CASES.

[61] The same rule which prevails in equity with reference to the married woman's power to charge her separate estate for the debt of another, has been held to prevail with respect to her power to charge for the same purpose her legal separate estate created by married women's legislation, like the Illinois Act of 1861. Athol Machine Co. v. Fuller, 107 Mass. 437; Bank of Commerce v. Baldwin, 14 Idaho 75, 93 Pac. 504, 17 L. R. A. (N. S.) 676; Grand Island Banking Co. v. Wright, 53 Neb. 574, 74 N. W. 82; Schmidt v. Postel, 63 Ill. 58.

In Wilder v. Richie, 117 Mass. 382, it was held that it did not relieve the married woman from liability upon her contract that she intended to and did give the money obtained to her husband.

A New Jersey case[62] goes farther, and says that even where the woman expressly charges her separate estate in equity, although such charge will be enforcible in equity for a debt of the married woman, i. e., where the married woman, herself, has enjoyed the proceeds of the obligation, yet it will not bind her where she incurs the debt only as surety. This case has been followed by some very respectable authorities. This result proceeds from the equitable theory that the woman must be protected, a theory which legislation follows.

102. **Under statute.**—What, then, is the effect upon this liability of the married women's acts? The extent of the change depends upon the particular statute. Thus an act that provides that a married woman shall, in respect to her separate property, have all rights and remedies in her own name and be liable to be sued upon any contract made or any wrong done by her in respect to such property, was held[63] to render not merely the property liable, but also the woman herself liable. In other words, under the common law the wife could never be personally liable. In equity she could not be personally liable. But under this statute she could be personally liable and her property would be liable; but the liability, whether personal or that of the property, could not arise under this act unless the contract was one made concerning the wife's separate property. Thus it was held that, under such statute, the married woman was not bound person-

[62] Perkins v. Elliot, 23 N. J. Eq. 526.
[63] Batchelder v. Sargent, 47 N. H. 262.

ally nor was her property bound, where she had no separate estate at the time she made the contract.[64] One authority adopts a very extreme view to the point of liberality.[65] In that case a married woman gave a note for money loaned to her. At the time she gave the note she had no separate property. Subsequently she acquired separate estate. It was considered by the court in this instance that when the woman obtained the money on the note, that money was her separate estate within the meaning of the statute, so that she became personally liable. It was suggested that the same rule would apply if she had obtained some article of personal property for her note. The effect of the decision, practically, was to render the woman liable on all her contracts, whether she had separate property at the time or not, whenever she derived some property or money from the contract. But where she made a contract of suretyship, she would not, even in this jurisdiction, be liable. In jurisdictions where a woman must bind her property by express terms to render it liable on her contracts, a contract binding her property in general terms was held not to bind property after-acquired, as by inheritance, and that, even though the power to bind after-acquired property existed in her.[66]

Under later married women's acts it seemed that contracts of married women to become sureties on their husband's obligations, were tolerated by the

[64] Palliser v. Gurney, L. R. 19 Q. B. D. 519 (Eng.).
[65] Sidway v. Nichol, 62 Ark. 146.
[66] Kocher v. Cornell, 59 Neb. 315.

law. Thus under an act giving the married woman the same power as if unmarried except that she and her husband could not contract with each other, the woman might become surety for the husband.[67] Under a statute like this, if the wife was compelled to pay on her suretyship undertaking for her husband, she could not, like other sureties, recover from the principal debtor, he being her husband and the statute forbidding her to contract with him. In other words, while she might under this type of statute go surety for him, she could get no indemnity from him. Some statutes expressly forbade the wife becoming surety for the husband. In certain cases, it has been held that the wife was liable on a note for money which she borrowed as principal, notwithstanding it was borrowed for the purpose of giving the money to her husband, in order to evade the effect of the statute.[68]

[67] Major v. Holmes, 124 Mass. 108.

[68] Iona Sav. Bank v. Boynton, 69 N. H. 77. The statute in force in New Hampshire at this time appears in Pub. St. 1891, c. 176, § 2. It is as follows: "Every married woman shall have the same rights and remedies, and shall be subject to the same liabilities in relation to property held by her in her own right, as if she were unmarried, and may make contracts, and sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done, as if she were unmarried. Provided, however, that the authority hereby given to make contracts shall not affect the laws heretofore in force as to contracts between husband and wife; and provided, also, that no contract or conveyance by a married woman, as surety or guarantor for her husband, nor any undertaking by her for him or in his behalf, shall be binding on her, except a mortgage releasing her right of dower and homestead."

CHAPTER XI.

CONVEYANCES AND DEVISES BY MARRIED WOMEN.

103. **Conveyances—At common law.**—The right of a married woman to convey her lands depends entirely upon statute. She had no such right at common law, it seems, even where her husband joined. The reason was that the law gave her this security as to her real estate. Thus, where a statute enabling a woman to convey her lands was repealed, and the new act inadvertently left out the enabling clause so far as it applied to non-resident married women, the latter had absolutely no power to convey their lands.[69] In New England they had a common law of their own which was peculiar to that part of the country and grew out of the exigencies of the colonies at the very early period of settlement. That common law provided that a married woman might convey her real estate by deed where her husband joined her.[70]

104. **Same subject—In equity.**—In equity, at the beginning, it seems that the married woman had the same wide latitude to charge her separate real estate, that she had as to personal property. Equity lawyers and judges soon perceived that this power was too great, so that it deprived the married

[69] Lane v. Soulard, 15 Ill. 123, LEADING ILLUSTRATIVE CASES.
[70] Manchester v. Hough, 5 Mason 67; Fed. Cases No. 9005.

woman of the security that the law considered she ought to have as to such property. They therefore invented a clause that was put into deeds and wills giving married women separate property, which clause or provision was known as a restraint on alienation, and operated to prevent her during coverture from deeding away the property or charging it with her debts. This restraint was effective only during marriage, so that she could devise her property. It seems that this restraint against alienation was applied also to personal property.[71]

105. **Same subject—Under statute.**—Under a statute providing that the real estate acquired by a married woman should remain her separate estate, it was considered that she must take such property subject to the conditions under which she acquired it, and if she failed to pay for it, and the grantor brought a proceeding to foreclose his vendor's lien, she could not tender back the land and demand back what she had paid, and so defeat his proceedings.[72] She was bound by the contract, and if she found that she had made a bad bargain, could not for that reason disaffirm like an infant. However, she could not execute a deed of trust that was enforcible, even in equity, where the deed was to secure a debt of the husband, for in such case she was contracting not concerning her separate estate, but as surety for her husband.[73]

Under later statutes, where a married woman was

[71] A. V. Dicey, Law and Public Opinion in England, pp. 375, 377.
[72] Carpenter v. Mitchell, 54 Ill. 126.
[73] Bressler v. Kent, 61 Ill. 426.

given the same powers and rights in respect to all her separate property, in the same manner and with the same effect as if she were unmarried, she was considered as having full power to convey her real estate, subject, of course, to possible rights of curtesy in the husband.[74] So, also, giving her power to convey and mortgage her real estate when the husband joins in the deed, also to make contracts for the enjoyment of such powers, except that she might not be surety for her husband, gives her power to mortgage her property to secure his debt, where she does not, as surety, sign the note that evidences the debt.[75] The reason for that is that her act of mortgaging the property is an independent act and not a contract of suretyship within the meaning of the statute, any more than if she had sold the property outright for the purpose of raising money with which to pay the husband's debts.

106. **Same subject—Specific performance against wife.**—The question occurs, what is the liability of a married woman on her contract to convey her property? It is clear that where an adult person, not under disability, makes a contract to convey his real estate, and refuses to fulfill the contract, the other party may sue him in equity for specific performance of the contract and equity will in such case order him to convey or, on his refusal to obey the order, convey the property for him.

At common law, of course, the question could not arise, as there the married woman had no

[74] Beal v. Warren, 2 Gray 447 (Mass.).
[75] Kuhn v. Ogilvie, 178 Pa. 303.

power at all. Under statutes, however, the situation has arisen. Thus, under a statute that enabled the married woman to convey her real estate by joining with her husband, but which did not give her power to make a covenant or contract binding her, she could not be bound under any covenants of warranty in the deed. Under such a statute it was considered that while she might convey the property absolutely by joining with her husband, she could not, even by joining with her husband, make only a contract to convey, and so where she made such a contract and afterwards refused to execute a deed of conveyance, there was no way of compelling her to do so.[76] Where, on the other hand, the statute provides that the married woman may deal with her separate property except that she may not give, grant, or sell the real estate without the consent of the husband, she may bind herself by a contract to convey, joined in by the husband.[77] The distinction between the two cases consisted in this, that in the former there was no power to make contracts, whereas in the latter there was such power.

Relieving against mistake. Another question in connection with the power of equity to assist in the matter of procuring specific performance of contract, appears where there is a mistake in the deed. As to an adult person not under disability, equity will reform a deed where there is actually a mistake in it. Under the early statutes giving the married woman power to convey her real estate where

[76] O'Reilly v. Kluender, 193 Mo. 576.
[77] Kingsley v. Gilman, 15 Minn. 59.

her husband joins, but not changing the common law any further, so that she could not make a contract, equity could not reform her deed.[78] It was necessary for her to make a new deed. Under a similar statute in Indiana it was considered that once the deed was executed in the form prescribed by the statute, and through error the property to be conveyed was misdescribed, where the woman had received the consideration of the deed, equity would reform it to make the description correct.[79] Where the act gives the woman power to render herself liable by contract concerning her separate estate, it was held that equity would reform a deed of the married woman conveying her property, her husband having joined,[80] but it would not correct as against her a deed of her husband's lands that she signed only to release her dower rights.[81] Under modern statutes the married woman's contracts could be specifically enforced in equity fully as well as those of any married man.[82] The following statute is typical:

MARRIED WOMEN.

Illinois Revised Statutes, 1911, Chapter 68, Page 1283.

§ 1. A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attach-

[78] Moulton v. Hurd, 20 Ill. 137.
[79] Hamar v. Medsker, 60 Ind. 413.
[80] Edwards v. Schoeneman, 104 Ill. 278.
[81] Knox v. Brady, 74 Ill. 476.
[82] Snell v. Snell, 123 Ill. 403.

ment or judgment in such action may be enforced by or against her as if she were a single woman.

§ 2. If husband and wife are sued together, the wife may defend for her own right, and if either neglect to defend, the other may defend for such one also.

§ 3. When the husband has deserted his family, the wife may prosecute or defend, in his name, any action which he might have prosecuted or defended, and, under like circumstances, the same right shall apply to the husband upon the desertion of the wife.

§ 4. For all civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in cases where he would be jointly responsible with her, if the marriage did not exist.

§ 5. Neither husband nor wife shall be liable for the debts or liabilities of the other incurred before marriage, and (except as herein otherwise provided) they shall not be liable for the separate debts of each other, nor shall the wages, earnings, or property of either, nor the rent or income of such property, be liable for the separate debts of the other.

§ 6. Contracts may be made and liabilities incurred by a wife, and the same enforced against her, to the same extent and in the same manner as if she were unmarried; but, except with the consent of her husband, she may not enter into or carry on any partnership business, unless her husband has abandoned or deserted her, or is idiotic or insane, or is confined in the penitentiary.

§ 7. A married woman may receive, use, and possess her own earnings, and sue for the same in her own name, free from the interference of her husband or his creditors.

§ 8. Neither husband nor wife shall be entitled to

recover any compensation for any labor performed, or services rendered for the other, whether in the management of property or otherwise.

§ 9. A married woman may own, in her own right, real and personal property obtained by descent, gift, or purchase; and manage, sell, and convey the same to the same extent and in the same manner that the husband can property belonging to him: *Provided,* that where husband and wife shall be living together, no transfer or conveyance of goods and chattels between such husband and wife shall be valid as against the rights and interests of any third person, unless such transfer or conveyance be in writing, and be acknowledged and recorded in the same manner as chattel mortgages are required to be acknowledged and recorded by the laws of this state, in cases where the possession of the property is to remain with the mortgagor.

§ 10. Should either the husband or wife unlawfully obtain or retain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried.

§ 11. In case the husband or wife abandons the other and leaves the state, and is absent therefrom for one year without providing for the maintenance and support of his or her family, or is imprisoned in the penitentiary, any court of record in the county where the husband or wife so abandoned or not confined resides, may, on application by petition, setting forth fully the facts, if the court is satisfied of the necessity by the evidence, authorize him or her to manage, control, sell, and incumber the property of the other, as shall be necessary, in the judgment of the court, for the support and maintenance

of the family, and for the purpose of paying debts of the other, or debts contracted for the support of the family. Notice of such proceedings shall be given as in ordinary actions, and anything done under or by virtue of the order or decree of the court, shall be valid to the same extent as if the same were done by the party owning the property.

§ 12. All contracts, sales, or incumbrances made by either the husband or wife, by virtue of the power contemplated in the preceding section, shall be binding on both, and during such absence or confinement, the person acting under such power may sue and be sued thereon; and for all acts done the property of both shall be liable, and execution may be levied or attachment issued accordingly. No suit or proceeding shall abate, or be in anywise affected, by the return or release of the person absent or confined, but he or she shall be permitted to prosecute or defend jointly with the other.

§ 13. The husband or wife affected by the proceedings contemplated in the two preceding sections may have the order or decree of the court set aside or annulled, by filing a petition therefor and serving a notice on the person in whose favor the same was granted, as in ordinary actions. But the setting aside of such decree or order shall in nowise affect any act done thereunder.

§ 14. A husband or wife may constitute the other his or her attorney in fact, to control and dispose of his or her property for their mutual benefit or otherwise, and may revoke the same to the same extent and in the same manner as other persons.

§ 15. The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately.

§ 16. Neither the husband nor wife can remove the other or their children from their homestead without the consent of the other, unless the owner of the property shall, in good faith, provide another homestead suitable to the condition in life of the family; and if he abandons her, she is entitled to the custody of their minor children, unless a court of competent jurisdiction, upon application for that purpose, shall otherwise direct.

§ 17. When the husband or wife is insane, and shall have been insane continuously for a period of not less than one year, and therefore incapable of executing a deed or mortgage, and relinquishing or conveying his or her right to curtesy, dower, or homestead in the real property of the other, the sane person may present his or her petition to any court having general chancery jurisdiction in the county where such petitioner resides, or where the real estate to be affected is situated, setting forth the facts, and particularly describing the real estate sought to be conveyed or mortgaged, and praying for an order authorizing the applicant, or some other person, to execute a deed of conveyance or mortgage for such insane person, and thereby relinquish his or her right of curtesy, dower, or homestead in said real estate.

107. **Devises—At common law.**—At common law a married woman's will as to real estate was absolutely void. As to personalty it was valid if the will was admitted to probate, but inasmuch as the husband was entitled to the wife's personal property, he could object to the will before probate; if he did, the will was invalid as to personal property.[83] At common law, marriage revoked a will of a single woman, even as to personal estate.

[83] Van Winkle v. Schoonmaker, 15 N. J. Eq. 384.

108. **Same subject—In equity.**—In equity a married woman could dispose only of her strictly separate estate at the time of making the will.[84] Any separate estate doubtless would not pass that was not separate estate at the time of the making of the will.

109. **Same subject—Under statute.**—Some of the early statutes expressly provided that the wills of married women were invalid. Under such statutes it was held that a married woman could not dispose of her separate estate.[85] Under later statutes giving a married woman all her property as her separate estate, it was held that she could will all her property in the same manner as other persons.[86]

Under a statute of Illinois in 1861, the separate estate of a married woman was defined as such property, received by her after coverture, as she should receive from persons other than her husband.[87] Under this statute it was decided that a married woman could not devise property given to her during coverture by her husband, and not settled to her separate use so as to make a separate estate in equity.[88]

[84] A. V. Dicey, Law and Public Opinion in England, pp. 378, 379.

[85] Naylor v. Field, 29 N. J. L. 287.

[86] In re Tuller's Will, 79 Ill. 99; see also subject, DESCENT, WILLS AND ADMINISTRATION.

[87] Emmert v. Hayes, 89 Ill. 11.

[88] Thompson v. Minnich, 227 Ill. 430-438; Zeust v. Staffan, 14 App. Cas. (D. C.) 200.

CHAPTER XII.

ESTOPPEL.

110. **At common law.**—How far does the rule of estoppel apply to married women? It was seen that in the case of infants, the general rule in this country refused to consider the principle of estoppel applicable to infants, for that was an indirect way of taking away their protection. In the case of married women, in England it seems that a married woman was estopped under circumstances that would estop one not under disability.[89] In the case cited a woman aided in procuring one to purchase from the life tenant, knowing the purchaser believed he was getting not only a life estate, but the fee simple title, and knowing the vendor, her mother, had only the life estate and that she, the married woman, had the remainder of the title; yet knowing all this, she stood by and permitted the purchaser to take under this impression without informing him of the true state of the title. The same jurisdiction held that a married woman was not estopped where she made a positive misrepresentation that she was a widow, when she was not, and therefore at common law had no power to convey real estate, so that the person who bought relying upon her active misrepresentation took nothing.[90] Possibly

[89] Savage v. Foster, 9 Mod. 35 (Eng.).

[90] Davenport v. Nelson, 4 Camp. 26 (Eng.).

the two cases are to be distinguished in this: that in the former case the misrepresentation was in no way connected with any contract of the married woman, while in the latter case it was, so that to enforce a rule of estoppel in the latter case would operate to enforce indirectly a contract which could not be enforced directly because the law said it was void. The former case was merely a plain case of fraud. It is submitted, however, that in the former case the remedy for the fraud, properly, is a suit in tort for damages and ought not to operate thus indirectly to make binding a conveyance which the law says could not be made directly.

The American rule is more consistent. In one case a married woman had made a deed which she had antedated so as to make it appear that she had really executed it before marriage, whereas she did, in fact, execute it after marriage. Subsequently, a man about to invest money in this property, and noting that this married woman had formerly held the title, went to the woman to examine the original deeds of title which she had. It was claimed that her silence at this juncture, while knowing that the investor was about to put money into the property relying upon the deed which she had antedated, estopped her from claiming that the deed was void, but the court properly held that one cannot accomplish by estoppel what could not be done by the woman's direct act.[91]

111. **Under statute.**—Under statutes which gave the woman power to control her separate estate, she

[91] Lowell v. Daniels, 2 Gray 161 (Mass.).

was bound in a case[92] where tradespeople extended credit to one who had been her agent, but whose agency she had terminated without notice to them and without their knowledge. Under a statute giving a married woman power to contract as if she were unmarried except that she could not be surety for her husband, it was held that she was not bound on notes on which she appeared as a co-principal with her husband, where she was really a surety.[93] In that case it was claimed that she was estopped because the one who took the note did not know but that she was a co-principal, but the court considered that the law made such a contract absolutely void, and could not be evaded in this way. This case, it must be remarked, is different from the case where the woman borrows money on her individual note and then turns the money over to her husband. A case of this latter type was encountered above, and it was held, under a similar statute, that the note was binding. That is not the proposition here, however, where the woman goes on the note with her husband as co-principal and the money paid on the note is paid not to her, but to him. Under the most modern statutes, which give her full control of her separate property, it is submitted she is liable to be estopped as fully as any other person.

[92] Bodine v. Killeen, 53 N. Y. 93.
[93] Farmington Nat. Bank v. Buzzell, 60 N. H. 189.

CHAPTER XIII.

TORTS AND ANTENUPTIAL LIABILITIES.

112. **Liability of married women for torts and crimes—In general.**—At common law the husband was liable for the wife's torts, but she was liable with him jointly and had to be joined except where the tort was committed in his company and by his command or encouragement;[94] for where she committed a tort by his command or encouragement, the husband alone was liable.

In some jurisdictions it is considered that where the tort is committed in the company or presence of the husband, coercion is presumed by his mere presence, and then the husband is liable unless the coercion by the husband is rebutted, in which event they are jointly liable.[95] Thus also, for crimes, the married woman is not liable where committed under coercion or compulsion of the husband in his presence,[96] but this is not true in treason and murder.[97] Compulsion is presumed where the wife acts in his presence,[98] except in the case of perjury.[99]

[94] Kosminsky v. Goldberg, 44 Ark. 401, LEADING ILLUSTRATIVE CASES.

[95] Smith v. Schoene, 67 Mo. App. 604; O'Brien v. Walsh, 63 N. J. Law 350.

[96] Commonwealth v. Feeney, 13 Allen 560 (Mass.).

[97] Bibb v. State, 94 Ala. 31.

[98] State v. Miller, 162 Mo. 253.

[99] Commonwealth v. Moore, 162 Mass. 441.

As suggested in the preceding chapter, a married woman may be liable in an action of tort for fraud or deceit,[1] where to render her so liable would not enforce her contract.

113. **Suits between husband and wife—Antenuptial liabilities—Generally.**—It might not be inappropriate at this stage to say a little of the right of husband and wife to sue each other. Of course, at common law no such suit could be maintained.[2] In equity, however, it seems this could be done. Various modern statutes have enabled them to sue each other upon contracts made with each other.[3] Reference is made to the specimen statute appearing at the end of Chapter XI, above; also to that section in Chapter VII, above, where the rights of husband and wife to testify for or against each other are dwelt upon; and to the chapter on divorce, appearing hereinafter.

114. **Effect of marriage on antenuptial liabilities to each other.**—The question is, does the marriage of the pair extinguish debts between husband and wife, so that even upon cessation of the marital state the obligation is dead, or does it simply operate to prevent suit upon the obligation by one spouse against the other? This question is presented in cases where, after marriage, the husband, who held a note made by the woman before her marriage to him, assigned the note to a third person. Was that note enforcible in the hands of the third person,

[1] Wright v. Leonard, 11 C. B. (N. S.) 258 (Eng.).

[2] Crowther v. Crowther, 55 Me. 358.

[3] Stone v. Wood, 85 Ill. 603 (where husband sued wife); Johnson v. Vail, 14 N. J. Eq. 423 (where wife, by next friend, sued husband).

a stranger to the wife? In one case it was decided that the marriage absolutely nullified the note.[4] Where a statute, however, gave the wife power to contract concerning her separate estate, though not with her husband, an assignee of such a note, it was held, could sue the wife, and the note was not nullified by the marriage, but while in the hands of the husband could not be sued upon, because husband and wife could not sue each other.[5]

[4] Chapman v. Kellogg, 102 Mass. 246.
[5] Spencer v. Stockwell, 76 Vt. 176.

CHAPTER XIV.

RIGHTS AND LIABILITIES INTER SE.

115. **Contracts and conveyances between husband and wife—At common law.**—At common law, conveyances from husband to wife, or vice versa, were void, as were also contracts between them. The husband, however, might convey to his wife through a third person, and might contract with her through a third person as trustee.

116. **Same subject—In equity.**—In equity a deed from the husband to the wife where it was in consideration of a settlement upon the wife, was good,[6] and contracts concerning the wife's separate estate in equity were also good. Thus where a husband borrowed money from his wife, which money he had given her as her separate property, she could recover in equity from his estate.[7] So, also, where the wife had given a mortgage on her property as surety for her husband's debts, she might, in equity, proceed against the husband's estate for exoneration.[8] It is to be noted that in these cases the husbands had died and the proceedings were in equity against the husbands' estates.

117. **Same subject—Under statute.**—It is to be observed that under acts which gave the wife the

[6] Shepard v. Shepard, 7 Johns. Ch. 57 (N. Y.).
[7] Slanning v. Style, 3 P. Wms. 334 (Eng.).
[8] Browne v. Bixby, 190 Mass. 69.

management and control of her separate property, a conveyance by her to her husband was still void, but a conveyance by her husband to her was good.[9] Under later acts which gave the wife power to convey and devise property as if unmarried, it was considered that the wife still might not convey to the husband, though the husband might convey to her.[10] The reason for that was, that though the powers of the married woman were increased, the act did not touch upon, and therefore did not remove, the husband's own disability to take from the wife. Some jurisdictions, however, adopted a view to the contrary,[11] and permitted such conveyances, especially where the act dispenses with the requirement that the husband join in the wife's deed.[12] In the case cited, the husband, who was trustee in a mortgage in which the wife was mortgagee, as such trustee deeded to the wife under a power of sale in the mortgage, and in order to foreclose it; but the court indicates the result would have been the same if the conveyance had been made from the wife to the husband.

As to contracts between the parties, under an act which gave the wife her sole and separate property and power to contract, sue, etc., same as a married man, the married woman, it was held, could sue her husband on a note given her.[13] The theory was that the objection to this at common law, being the

[9] Rico v. Brandenstein, 98 Cal. 465.
[10] White v. Wager, 25 N. Y. 328.
[11] Savage v. Savage, 80 Me. 472.
[12] Wells v. Caywood, 3 Colo. 487.
[13] May v. May, 9 Neb. 16.

unity of wife and husband, was purely a technical one, and the statute abolished that objection.

Under the modern acts, a married woman has power to contract with her husband. In one instance, it was held that under a statute which enabled the wife to be surety for the husband, she might form a business partnership with him.[14]

118. **Same subject—Conveyances in fraud of creditors.**—It might be well to mention, at this point, that where a husband conveys to the wife, or vice versa, and without consideration, for the purpose of preventing creditors from attaching the property, the creditors may go into equity to have such conveyance set aside as to them.

119. **Civil and criminal responsibility to each other—At common law.**—At common law the parties could not sue each other, and could not commit a tort, one against the other; and could not steal, one from the other, for they were a unity. Of course, a husband or wife would be guilty of murder of the other.

120. **Same subject—Under statutes.**—Under an act giving the woman power to sue concerning her separate estate as if sole, she could sue her husband for her real property,[15] and doubtless also for her personal property,[16] but she could not sue him for libel and slander.[17] So a wife was not guilty of stealing from her husband even where she was in the commission of adultery at the time, nor was the

[14] Louisville & N. R. R. Co. v. Alexander, 16 Ky. Law Rep. 306.
[15] Minier v. Minier, 4 Lans. 421 (N. Y.).
[16] Smith v. Smith, 20 R. I. 556.
[17] Minier v. Minier, supra.

act of her paramour in receiving the goods from her held to be that of receiving stolen goods.[18] In some jurisdictions, it is held that the modern statutes giving the wife all the powers of an unmarried person, sever the unity of husband and wife to the extent that a husband can be criminally guilty of stealing from his wife.[19]

As to the liability of the husband for tort to the wife, under statutes enlarging the wife's power to contract and deal with her separate property, it appears that there is still no liability to each other for civil injury committed by one against the person of the other.[20]

As to criminal liability, some authorities hold that a husband is not criminally liable for assault on his wife, as by chastising her, except where he does so maliciously, or inflicts permanent injury upon her, or such is threatened, or the conduct of the husband becomes intolerable,[21] though possibly the better rule renders him criminally liable under modern statutes for any assault, and denies him all right to chastise the wife.[22] Where the wife remains away from the husband of her own free will, he cannot, by force, compel her to return, not even by the old writ of restitution of conjugal rights,[23] nor can he compel her to remain by imprisoning her.[24]

[18] Queen v. Kenny, L. R. 2 Q. B. D. 307 (Eng.); Thomas v. Thomas, 51 Ill. 162.

[19] Beasley v. State, 138 Ind. 552.

[20] Abbott v. Abbott, 67 Me. 304; Peters v. Peters, 42 Iowa 182; Strom v. Strom, 98 Minn. 427.

[21] State v. Rhodes, 61 N. C. 453.

[22] Fulgham v. State, 46 Ala. 143; State v. Finley, 4 Pennewill 29 (Del.).

[23] See Blackstone's Commentaries.

[24] Queen v. Jackson, L. R. 1 Q. B. D. 671 (Eng.).

CHAPTER XV.

ESTATES BY ENTIRETIES.

121. **Meaning of estates by entireties.**—At common law, when property was conveyed to two persons, they became joint tenants, and if one died the property all belonged to the survivor. If, while both grantees were alive, one of them conveyed his interest to a third person, that third person and the one who had not conveyed became tenants in common, and if one of these owners, i. e., the original joint tenant or the new owner, died, his heir inherited his share, which was an undivided half. Where, however, property was at common law conveyed to husband and wife, it was considered as being conveyed to a unity, and then if one died, the survivor took just as in joint tenancy, but while the husband and wife were alive, neither could convey away his or her interest because he or she had no interest except as part of the unity. So their estate was different from a joint tenancy, and was called tenancy by entireties. If property was conveyed to two persons they became joint tenants, and if afterwards the two joint tenants intermarried, they would still be joint tenants and not tenants by entireties, so that then if one conveyed to a third person, there would be a tenancy in common. If property was conveyed to three persons, none of whom were husband and wife, it would be a joint

tenancy of three persons, and if none of them conveyed his interest, the ultimate survivor would take all; but if one conveyed his interest to another person, it would become a tenancy in common as to all three, i. e., the new owner and the two original joint tenants, and each would thereupon be entitled to an undivided third, so that upon the death of any one his undivided third would go to his heir. If property was conveyed to three persons, two of whom were husband and wife, the husband and wife would be tenants by entireties as to one half, and the unity of husband and wife and the other person would be joint tenants, so that if the other person conveyed his interest to still another there would be a tenancy in common, with the new owner having one undivided half, and husband and wife, together, the other undivided half. If the husband and wife together conveyed their interest to another person, instead of the other grantee conveying, there would be the same kind of a tenancy in common with undivided halves in the new owner and the one original owner.[25]

122. **Statutory changes.**—Modern statutes have, almost without exception, abolished joint tenancies and recognize only tenancies in common, so that the rule of survivorship does not apply unless the deed expressly provides that there shall be a joint tenancy and not a tenancy in common.[26] Such statutes, however, do not change tenancies by entireties.[27] In Illinois and some other states it is held

[25] Hardenbergh v. Hardenbergh, 10 N. J. Law 42.
[26] Revised Statutes of Illinois, 1911, chap. 30, p. 522.
[27] Hardenbergh v. Hardenbergh, 10 N. J. Law 42.

that the statute changing the condition of unity of the parties thereby, by inference, abolishes the estate of tenancy by entireties.[28]

Suppose, now, in case of tenancy by entireties, one of the parties was divorced, how would that affect such a tenancy? In such case it cannot all go to either one. Some jurisdictions hold that divorce changes it to a joint tenancy at common law, and, where the statutes change that to tenancy in common, to a tenancy in common under statute.[29] Pennsylvania holds that divorce cannot affect the estate at all, but it remains a tenancy by entireties until one of the original parties to the marriage dies.[30]

A question has arisen whether there can be an estate by entireties of personal property. One jurisdiction, by divided court, holds that there may be, the minority holding that there cannot be, because the husband is entitled to all the personalty at common law.[31]

[28] Walthall v. Goree, 36 Ala. 728; Cooper v. Cooper, 76 Ill. 57; Mittel v. Karl, 133 Ill. 65.

[29] Stelz v. Shreck, 128 N. Y. 263.

[30] Allen v. Lyon, 216 Pa. 604.

[31] Phelps v. Simons, 159 Mass. 415.

CHAPTER XVI.

DIVORCE AND ALIMONY.

123. **Divorce—At common law.**—At common law there was no absolute divorce. There was what was called annulment of marriage for fraud or from incapacity, such as pre-contract (an existing marriage), because of consanguinity or relation by blood, affinity or relation by marriage, or corporal infirmity or impotency. There was also divorce *a mensa et thoro* (from bed and board) for adultery and cruelty. This latter form of divorce did not entitle the parties to intermarry again with other persons,[32] and did not affect the property rights of the parties.

It follows that in this country the subject is strictly statutory, and no divorce can be granted except on a ground that falls exactly within the statute. The courts are powerless to act in any cases except such as are based upon statutory grounds. Thus, in Illinois there are only eight grounds upon which divorce may be granted and it will be seen that insanity and incompatibility are not among them.[33]

124. **Same subject—Under statute.**—In order to obtain a divorce it is absolutely essential to observe particularly all the requirements of the statute

[32] Hamaker v. Hamaker, 18 Ill. 137.

[33] See Illinois Divorce Law at end of this chapter.

under which the divorce is sought. Unless the statute provides for a divorce on the ground set out in the petitioner's complaint, the courts will not grant one. Thus, where the statute failed to enumerate corporal impotence as a ground, a divorce on that ground, even in a most flagrant case, where the condition was unknown to the other party, was denied.[34]

As marriage is considered more than a mere contract, being one of the domestic relations,[35] the law does not permit its dissolution merely because the principals wish it. Therefore, the law requires strict proof of the grounds indicated by the statute as the grounds upon which divorce will be granted. In a suit for divorce, it very often happens that the defendant makes no defense. Even there the courts commonly require more than the unsupported testimony of the complaining party because the public is interested in preserving the marriage status.[36]

125. **Grounds.**—There are some grounds of divorce that are common in most states. They are, possibly, adultery, cruelty, desertion, and penal imprisonment of one of the parties. To these, some states add habitual drunkenness, others add incompatibility, insanity, impotence, etc. The only difficulty with any of these grounds is in the degree of proof required, and the four principal grounds above enumerated will be briefly covered with a view to throwing some light on that difficulty.

[34] Burtis v. Burtis, 1 Hopk. Ch. 557 (N. Y.).
[35] Ditson v. Ditson, 4 R. I. 87.
[36] Kline v. Kline, 104 Ill. App. 274.

126. **Same subject—Adultery.**—It is not necessary to prove the direct fact of adultery, but it is sufficient to prove this from circumstances. The reason for dispensing with strict proof in this case is that such act is always accomplished in secrecy, so that actual proof is impossible. Therefore, it is sufficient if proof be made of circumstances unavoidably leading to such conclusion.[37]

127. **Same subject—Cruelty.**—Different statutes set up different standards of proof. The general rule is that physical blows must be struck, and that mental injury and anguish, though provoked to the extreme by acts of the spouse, are insufficient.[38] Some jurisdictions consider that a husband cannot obtain a divorce on this ground unless he shows that he is a weakling in body compared with a wife of giant stature and proportions.[39] Some jurisdictions, however, hold that mental suffering may be such cruelty within the meaning of the statute, as to entitle to a divorce.[40] Thus, false charges of infidelity of the husband, widely circulated in the community, coupled with coldness, neglect, lack of interest in family affairs, aggressive action against his means of livelihood, irritability, petulance, and scorn, to the extent of breaking up the home, were held to be tantamount to physical violence.[41] Refusal to cohabit, however, is not cruelty.[42]

[37] Matchin v. Matchin, 6 Pa. 332.
[38] Mathewson v. Mathewson, 81 Vt. 173.
[39] Severns v. Severns, 107 Ill. App. 141-144.
[40] Mosher v. Mosher, 16 N. Dak. 269, LEADING ILLUSTRATIVE CASES.
[41] Massey v. Massey, 40 Ind. App. 407.
[42] Cowles v. Cowles, 112 Mass. 298.

128. **Same subject—Desertion.**—Different statutes provide different kinds of desertion as amounting to ground for divorce. All statutes require an absence for some certain period. Mere living apart, however, is not desertion, nor is it necessary in all cases of desertion that there be a physical departure by one spouse from the other. Thus the parties may be living apart for no fault of the one who is away, as where the wife left because the husband was intemperate and refused to support her.[43] Thus, it was held that the person who left might maintain a suit for divorce on account of desertion, where the acts of the other spouse compelled her to leave.[44] But other cases hold that, to grant a divorce on the ground of desertion except where the defendant has actually made a physical departure from the claimant, there must be a denial by the defendant of all the usual duties of marriage, and cohabitation, being but one, refusal thereof alone is not sufficient,[45] while still other cases hold that in no case will a divorce be granted unless there is a physical departure.[46] What amounts to deprivation of all rights of marriage is difficult of definition. Certainly where a husband allows an officer to put his wife out into the street and provides her no home, there is such.[47] But continual nagging and making things miserable at home for the husband, where the wife is faithful and attends to the housework and prepares meals,

[43] James v. James, 58 N. H. 266.
[44] Same case.
[45] Fritz v. Fritz, 138 Ill. 436.
[46] Pidge v. Pidge, 3 Met. 257 (Mass.).
[47] Curlett v. Curlett, 106 Ill. App. 81.

though otherwise she acts like a stranger to the husband, is not desertion.[48]

In order to amount to desertion, it must appear that the defendant, wilfully and without excuse, remained away for the full statutory period. Thus where one left her husband and subsequently became insane, the period of insanity could not be included in computing the statutory period of desertion, though if the period had become complete before the insanity, the subsequent insanity would not have precluded a divorce.[49] The reason why statutes require the abandonment to have continued for a certain period, is to give the erring party a time for repentance. Therefore, if insanity develops before the period is complete, the full period of repentance would not be given. So also where the original departure was because of insanity, so long as insanity continued there could be no desertion; but if after the person was cured and pronounced again sane, he refused to return to his wife, his desertion would commence as of the date of refusal to return.[50] Once a spouse has abandoned the other, the one abandoned may visit the deserter and try to persuade him to return, even cohabit with him while so visiting, without interrupting the period of desertion.[51]

129. **Same subject—Imprisonment.**—Here again everything depends upon the statute. Where a statute provides that a divorce may be decreed "when

[48] Fritz v. Fritz, 138 Ill. 436.
[49] Storrs v. Storrs, 68 N. H. 118.
[50] Douglass v. Douglass, 31 Iowa 421.
[51] Danforth v. Danforth, 88 Me. 120.

either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison, or in a jail or house of correction," it was held that this means the state prison of the particular state granting the divorce, and the court would not allow a divorce to a woman in Massachusetts because her husband had been sentenced to the Wisconsin state prison.[52] Once a person is imprisoned within the meaning of the statute, a pardon from the governor does not defeat his wife's right to divorce.[53]

130. **Defenses.**—There are four well known and established defenses possible in every suit for divorce. Inasmuch as the state will refuse a divorce except where public policy and the good of society are furthered thereby, anything that indicates to the court that the proceeding is a "frame up," will cast upon the court the duty to deny the decree. The question of whether a divorce shall be granted always comes before a court of chancery, i. e., a court of equity, and it is in the discretion of the court whether to grant a decree or not, and this discretion is a very wide one. Thus we have the four defenses as follows: 1. Collusion. 2. Connivance. 3. Condonation. 4. Recrimination.

131. **Same subject—Collusion.**—Collusion exists where the parties wish a divorce, but knowing that either one has but a very weak case so that the other by interposing a defense could defeat the proceeding, agree the one to prosecute the suit and the other

[52] Leonard v. Leonard, 151 Mass. 151.
[53] Holloway v. Holloway, 126 Ga. 459.

to interpose no defense. The arrangement usually takes the form of an agreement by the wife to ask for no alimony.[54] It is distinguished from connivance in that in collusion both parties are desirous of a divorce, but have insufficient or faulty grounds therefor. Also where one agrees to commit adultery in order that the spouse might obtain a divorce, it is collusion.[55]

132. **Same subject — Connivance.**— Connivance occurs where one party is unwilling or not intending to get a divorce. Thus the one desiring to obtain a divorce schemes to put the other spouse in compromising situations, or casts temptations in his way so as to manufacture grounds that did not before exist. The husband, for example, is not conniving at her acts because he permits a wife whom he suspects of infidelity, to continue in her evil ways without warning her that he is watching, but he does connive where he goes farther than that and makes opportunities for her instead of leaving her free to follow opportunities she herself has made.[56] In the case cited, the complainant arranged with the landlord of the house where his wife was staying to permit her and another man to pass the evening together in privacy, though permission to do so had been refused the wife once before by the landlord's wife; this was held to be connivance, and a divorce denied.

133. **Same subject — Condonation.**— Where the wronged party cohabits with the erring party after

[54] Thompson v. Thompson, 70 Mich. 62.
[55] Todd v. Todd, L. R. 1 P. & D. 121 (Eng.).
[56] Noyes v. Noyes, 194 Mass. 20.

knowledge of adultery, there is what is called condonation, which is a complete defense. However, to amount to condonation, it must appear that the wronged party knows of the wrong and mere suspicion is not enough.[57] In the case of cruelty, a condonation by the wife is conditional upon the husband's treating her in the future with conjugal kindness, and any breach of this condition will revive the right to maintain a suit for the original offense, and such a breach of that condition may be shown by acts, words or conduct which would not of themselves prove a ground for divorce.[58] Thus in Illinois, to prove cruelty sufficient to be ground of divorce by wife from husband, at least two blows or acts of physical violence must be shown. After condonation of such offense, one blow, though insufficient of itself, would, by reviving the prior ground, insure a divorce.[59]

134. **Same subject—Recrimination.**—As the complainant seeking a divorce must come into equity for it, equitable rules apply and the divorce would be denied one who was himself also at fault. That is called recrimination. It seems that the recriminating acts must be of equal or greater enormity. Thus to a proceeding setting up adultery, adultery is good recrimination, and where the charge is cruelty or desertion, adultery is a good recrimination.[60] The reverse is not true, as a general rule. Thus where the charge is adultery, and desertion is set up in recrimination, such is not sufficient for recrim-

[57] Shackleton v. Shackleton, 48 N. J. Eq. 364.
[58] Robbins v. Robbins, 100 Mass. 150.
[59] Moorhouse v. Moorhouse, 90 Ill. App. 401.
[60] Clapp v. Clapp, 97 Mass. 531.

ination,[61] though some states hold that one statutory ground is recrimination as against suit brought on any other statutory ground,[62] but it must be an existing statutory ground and not condoned.[63]

It must be observed that recrimination is not commonly availed of, except where the defendant is unwilling for some reason to have the marriage dissolved. The common practice is for the defendant to set up matters of recrimination in a cross-bill for divorce on behalf of the defendant.

135. **Alimony—Defined.**—Alimony in a general sense means the allowance required by law to be made to a wife out of her husband's estate for her support, either during a matrimonial suit or at its termination, where the fact of marriage is established and she proves herself entitled to a separate maintenance.[64] It is now generally governed by statute and is commonly considered under two classifications, (1) temporary and (2) permanent. From the very nature of the relations of husband and wife at common law, alimony could only be had by the wife, for upon the husband rested the duty to support the wife and there was no reciprocal duty of support resting upon the wife. Statutes have not altered the common law rule in this regard, but on the contrary, expressly give the right to the wife and not the husband.[65]

[61] Bast v. Bast, 82 Ill. 584.
[62] Cushman v. Cushman, 194 Mass. 38.
[63] Storms v. Storms, 71 N. J. Eq. 549.
[64] 14 Cyc. 742.
[65] Groth v. Groth, 69 Ill. App. 68; Somers v. Somers, 39 Kan. 132, 17 Pac. 841.

136. **Same subject—Temporary.**—At common law applications for alimony during the pendency of a suit for divorce or separate maintenance between husband and wife were granted almost as a matter of course, the only showing necessary to be made by the wife being that there was a marriage in fact, even though its validity was in dispute.[66] This was commonly called temporary alimony and was subject to readjustment on final decree. The reason for its allowance was necessity, for at common law the husband acquired complete control over all the property owned by his wife at the time of the marriage or acquired by her during coverture, and consequently she would be left destitute and defenseless during the litigation unless she had the right to call upon her adversary for support and the means to carry on the litigation. Thus the doctrine that a married woman is entitled to temporary alimony and counsel's fees, whether she be complainant or defendant, was well settled.[67] The question then arises, have modern statutes affected this common law right? Some statutes expressly provide for alimony pendente lite (during suit). But modern statutes have removed the disability of married women to hold and deal with her own property and the question is, does not that remove the reason for allowing the wife the temporary alimony? The answer must be that it does where the wife has property and means of her own, and where that is shown, the court will in its discretion refuse to grant such ali-

[66] Vroom v. Marsh, 29 N. J. Eq. 15.
[67] Westerfield v. Westerfield, 36 N. J. Eq. 195.

mony.[68] Generally the situation finds the wife in much the same position pecuniarily as at common law.

Possibly the practical difference between temporary alimony and permanent alimony lies in the enforcement. The former, it seems, must be enforced, if at all, by direct order of the court through its power to hold the husband in contempt and throw him into prison if he fails to obey. It would follow that temporary alimony cannot be enforced if the husband escapes the jurisdiction of the court. Permanent alimony, however, may be enforced like any other final judgment or decree.[69]

137. **Same subject—Permanent.**—At common law, a delinquent wife, on account of whose conduct the husband obtained a divorce, was not entitled to receive alimony.[70] This, however, has been generally changed by statute so as to leave it to the discretion of the court. Thus where, at the time the wife married the complainant, he had little or no property, and during fifteen years of married life, principally through the thrift and frugality of the wife, the husband amassed property to the value of $5,000, there, even though the wife was at fault, the court considered she ought to receive some of the property, though not as much as one-half.[71]

The amount of permanent alimony varies with the circumstances of each case. It must be reasonably within the means of the husband and must be sufficient for the needs of the wife considering her abil-

[68] Westerfield v. Westerfield, 36 N. J. Eq. 195.
[69] Ford v. Ford, 41 How. Pr. 169 (N. Y.).
[70] Ecker v. Ecker, 22 Okla. 873, 98 Pac. 918.
[71] Same case.

ity, her age and condition. The fact that she contributed to amassing the husband's estate is always a factor in determining the amount, as is also the fact that she assumes the custody and support of the children. At common law permanent alimony was payable in installments and an allowance in gross out of the husband's estate was not recognized,[72] though statutes now invariably permit an allowance in gross.

The claim for alimony is usually personal and terminates with the death of either party.[73] However, the court may make it a charge on the husband's estate during the life of the wife, irrespective of the earlier death of the husband,[74] and in that case it will continue until the wife's death. It may be diminished or enlarged by the court during its continuance,[75] depending upon the altered circumstances of either of the parties from time to time.

138. **Operation of divorce on rights of the parties —Custody of children.**—For a fuller discussion of this subject, reference should be had to the chapters on Parent and Child. Suffice it to say in this connection that it is within the power of the court to award the custody of the children to either of the parties or some to one and the others to the other party. The court is governed first by the best interests of the children and secondarily only by the rights of the parties, and where the best interests of the

[72] Wilson v. Wilson, 3 Hagg. Eccl. 329 (Eng.).

[73] Craig v. Craig, 163 Ill. 176.

[74] Stratton v. Stratton, 77 Me. 373.

[75] Stratton v. Stratton, 77 Me. 373; Beadleston v. Beadleston, 103 N. Y. 402.

child require it, will award the custody to someone other than the parents.

139. **Same subject—Property rights.**—Absolute divorce terminates all rights of one spouse as heir or next of kin of the other except that one who obtains the divorce for the fault of the other, is still entitled to dower or curtesy in the spouse's real estate, and this right is not lost by the marriage of the recipient thereof.[76] A divorce *a mensa et thoro* (from bed and board) does not, unless so expressly provided by the statute, affect the property rights of the parties. Such a divorce is merely a separation agreement imposed by the court which the court enforces. It is not in effect in this country except where expressly provided for by statute.

140. **Legislative divorce.**—The state has power over the status of marriage and therefore may by legislation dissolve a marriage. This has been resorted to in some cases, as where the existing laws afforded no relief in a very meritorious case. Thus, particularly hard cases in the event of insanity and incompatibility are sometimes dealt with in that way.[77]

141. **Separation agreements.**—The law does not permit husband and wife voluntarily to sever the bonds of matrimony by mere agreement to become divorced. Under the early common law, it was not even permitted to enter into an agreement relative to the property rights of husband and wife where they decided to live apart. Modern authorities tend

[76] Kent v. McCann, 52 Ill. App. 305.
[77] Maynard v. Hill, 125 U. S. 190.

to permit what are called separation agreements. Such an agreement is a formal contract entered into between the parties whereby they agree to live apart, and provides for a division of the property of both or one of the parties. The law will recognize such an agreement so far as it settles the property rights of the parties and will protect either one in the property secured to him or her under the agreement.[78] Where, however, the one spouse persists in bothering the other with his or her presence contrary to the agreement, the courts will refuse to enforce the agreement by making the one spouse remain away from the other.[79] The theory is that where the separation is unavoidable anyway and the agreement serves merely to fix the property rights or the amount of the allowance to be given the wife by the husband, or where the parties are already living apart, the courts will enforce the agreement so far as sustaining the property rights, but the courts will not lend aid to causing or continuing a separation, as that is against public policy.

142. **Effect of divorce decree.**—Oftentimes in suits for divorce, it is necessary to obtain service upon the defendant by substituted service, i. e., it is impossible in numerous cases to serve defendant personally with the summons, and statutes, generally, provide for service by publishing a notice in the newspaper a certain number of times, and mailing a copy of the notice to the defendant's last known

[78] Commonwealth v. Richards, 131 Pa. 209.

[79] Aspinwall v. Aspinwall, 49 N. J. Eq. 302; Collins v. Collins, 62 N. C. 153.

address. Where the service was personal, the decree rendered is absolutely binding in all states of the Union as well as in the state, where rendered; but where the service was constructive, the divorce is not conclusive in states outside of that where rendered, and the defendant may start a divorce suit of his own in another state and if he can show proper grounds in his suit may obtain a decree himself.[80] This has caused the anomalous and deplorable condition of two divorce decrees in the same matter between the same parties in two different states, and the consequent agitation for a uniform divorce law.

As to remarriage. Numerous states have statutes providing that in case of divorce the parties may not marry again within a certain time unless they remarry each other. Such laws have no force outside the state where they are enacted, and the parties may go out of the state and marry again with impunity within the time limit and so long as they stay outside of the state where they were divorced they will be unmolested. The remarriage is binding in all states except the one where the divorce was granted.[81]

DIVORCE LAW.

Illinois Revised Statutes, 1911, Chapter 40, Page 861.

§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That in every case in which a marriage has been, or hereafter may be contracted and solemnized between any

[80] Haddock v. Haddock, 201 U. S. 562

[81] Wilson v. Cook, 256 Ill. 460.

two persons, and it shall be adjudged, in the manner hereinafter provided, that either party at the time of such marriage was, and continues to be, naturally impotent; or that he or she had a wife or husband living at the time of such marriage, or that either party has committed adultery subsequently to the marriage; or has willfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of two years; or has been guilty of habitual drunkenness for the space of two years; or has attempted the life of the other by poison or other means showing malice, or has been guilty of extreme and repeated cruelty; or has been convicted of felony or other infamous crime, it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract.

§ 1a. That in every case in which a divorce has been granted for any of the several causes contained in § 1 of said act, neither party shall marry within one year from the time the decree was granted; *Provided,* when the cause of such divorce is adultery, the person decreed guilty of adultery shall not marry for a term of two years from the time the decree was granted; *Provided, however,* that nothing in this section shall prevent the persons divorced from remarrying each other; and every person marrying contrary to the provisions of this section shall be punished by imprisonment in the penitentiary for not less than one year, nor more than three years, and said marriage shall be held absolutely void.

§ 2. No person shall be entitled to a divorce in pursuance of the provisions of this act, who has not resided in the state one whole year next before filing his or her bill or petition, unless the offense or injury complained of was committed within this state, or whilst one or both of the parties resided in this state.

§ 3. No divorce shall, in anywise, affect the legitimacy of the children of such marriage, except in cases where the marriage shall be declared void on the grounds of a prior marriage.

§ 7. When the defendant appears and denies the charges in the complainant's bill for a divorce, either party shall have the right to have the cause tried by a jury.

§ 8. If the bill is taken as confessed the court shall proceed to hear the cause by examination of witnesses in open court, and in no case of default shall the court grant a divorce, unless the judge is satisfied that all proper means have been taken to notify the defendant of the pendency of the suit, and that the cause of divorce has been fully proven by reliable witnesses. Whenever the judge is satisfied that the interests of the defendant require it, the court may order such additional notice as equity may seem to require.

§ 9. No confession of the defendant shall be taken as evidence unless the court or jury shall be satisfied that such confession was made in sincerity and without fraud or collusion to enable the complainant to obtain a divorce.

§ 10. If it shall appear, to the satisfaction of the court, that the injury complained of was occasioned by collusion of the parties, or done with the assent of the complainant for the purpose of obtaining a divorce, or that the complainant was consenting thereto, or that both parties have been guilty of adultery, when adultery is the ground of complaint, then no divorce shall be decreed.

§ 15. In all cases of divorce the court may require the husband to pay to the wife, or pay into court for her use during the pendency of the suit, such sum or sums of money as may enable her to maintain or defend the suit; and in every suit for divorce, the

wife, when it is just and equitable, shall be entitled to alimony during the pendency of the suit. And in case of appeal or writ of error by the husband, the court in which the decree or order is rendered, may grant and enforce the payment of such money for her defense, and such equitable alimony during the pendency of the appeal or writ of error, as to such court shall seem reasonable and proper.

§ 16. The court, upon granting to a woman a divorce from the bonds of matrimony, may allow her to resume her maiden name or the name of any former husband.

BIBLIOGRAPHY.

To supplement the text of this article the following treatises by leading authors are recommended for further reading: *Frazer,* Parent and Child (2nd ed.); *Eversley,* Law of Domestic Relations; *Reeves,* Domestic Relations (4th ed.); *Rodgers* on Domestic Relations; *Schouler,* Domestic Relations (4th ed.); *Field,* Law of Infants; *Bishop* on Marriage, Divorce and Separation; *Browne* on Divorce (5th ed.); *Peck,* Domestic Relations.

QUIZ QUESTIONS
CRIMINAL LAW

(*The numbers refer to the numbered sections in the text.*)

1. (a) Define a crime.
   (b) Distinguish between a crime and a tort.
2. (a) Define treason.
   (b) What crimes are felonies?
   (c) What is a misdemeanor?
3. What portion of the English criminal law is in force in the United States?
4. A is indicted for intending to murder B. Can he be convicted?
5. What effect has the consent of the person injured on the act of the person inflicting the injury?
6. A attacks B with intent to rape her. Before he succeeds she consents. Can he be convicted of rape?
7. A obtains B's consent to carnal intercourse by fraudulently promising to marry her. Is he guilty of rape?
8. A steals a watch from B that B has himself stolen from C. Has A a good defense to an indictment for larceny of the watch?
9. Is contributory negligence a good defense in criminal law?
10. A stole a horse from B, but repenting, returned it to B, who promised not to prosecute him. Can A be indicted subsequently?
11. Is it criminal to do an act that is commonly done in the community, and that no one has ever before been indicted for?

12-63. A mob threatened to kill the sheriff, if he did not deliver a prisoner to them. The sheriff delivered the prisoner. Can he be convicted of allowing a prisoner to escape?
(b) A ordered B, his son, to steal a watch. B stole it. Has B a good defense?

13. Why can a person not be convicted for killing another by accident, without negligence?
14. What is the test as to whether intent is necessary in a statutory crime?
15. Is intent always necessary to constitute a crime?
16. What is meant by constructive intent?
17. In what cases is constructive intent insufficient?
18-214. A broke into B's house at night to take refuge from a storm. While in the house he stole a watch. Can he be convicted of burglary?
19. What is the effect of several intents in the doing of an act?
20. A is indicted for setting fire to the house of B, with intent to injure B. The object A had in mind in setting the fire was to obtain a reward that had been offered by an insurance company to any one giving notice of a fire. Can A be convicted?
21-22. What is the general rule as to mistake of law, and mistake of fact?
23. What is the rule in regard to an infant's responsibility for his acts?
24. What is general insanity; partial insanity; intermittent insanity?
25. (a) Is a person suffering under an insane delusion responsible for his acts?
(b) What are the various tests of insanity?
26. Does irresistible impulse excuse an act?
27. On whom is the burden of proof where insanity is alleged?
28. What is the general rule as to intoxication?
29. A was indicted for obtaining goods by false pretense. Is drunkenness a good defense?
30. For what class of crimes can a corporation be indicted?
31-32. A was attempting to cheat B by the use of loaded dice. B, discovering the cheat, tried to arrest A. A resisted, and was about to escape, when B shot and killed him. Was B justified in killing A?
33. What force may be used in preventing a felony?
34. A, a school teacher, knocked down B, a pupil, twenty years of age, for gross disorder in school. Is A guilty of assault and battery?

35. A was attempting to put his plow in B's barn against B's protest. B picked up a brick and threw it at A at a distance of fifteen feet. The brick struck A in the head, killing him. Is B liable for the death of A?
36. State the law of self-defense.
37. Under what circumstances must a person assailed retreat before he can justify a killing in self-defense?
38. Can the aggressor in a fight ever kill in self-defense?
39. A and B were engaged in mutual combat. A put his hand to his pistol-pocket, saying, "I will kill you," whereupon B drew a pistol and killed A. A had no weapon in his pocket. Can B justify the killing?
40. A saw B attempting to rape his (A's) daughter. A shot and killed B. Was he justified in so doing?

41-46-23. A procured B, a boy six years of age, to steal. A was not present when B took the property. Is A a principal, or an accessory to the larceny?

42-43. When is a person present so as to be a principal?

44-45. What is the rule as to the responsibility of one accomplice for the acts of another?

46. (a) How does an accessory before the fact differ from a principal?

(b) How does an accessory before the fact differ from one guilty of solicitation?

(c) In what class of crimes, only, can there be an accessory?

47-48. What is an accessory after the fact?

49-50. How does the responsibility of a principal for the act of his agent differ in the civil and the criminal law?

51. What is the crime of attempt?
52. A procured a barrel of whiskey on Saturday, intending to sell from it the next day in his saloon. He opened his saloon the next day (Sunday), but no customers came in. Can A be indicted for an attempt to sell whiskey on Sunday?

53-54. A, being slightly intoxicated, mistook a wooden Indian standing in front of a cigar store for B, his enemy. He fired at the wooden Indian. Can he be convicted for an attempt to kill B?

55. What kind of intent is necessary in attempt?

56. What is the crime of solicitation?
57. Define conspiracy.
58-61. What are the principal crimes against religion and morals?
61. A got drunk at a banquet. Is he guilty of a crime?
62. A, being indicted by the grand jury, secretly took the indictment and destroyed it. Is he guilty of a crime?
63. A, a jailer, after visiting one of the prisoners, went from the cell, forgetting to lock the door. The prisoner escaped. Can the prisoner and the jailer be indicted?
64. A, seeing his brother, B, in the custody of an officer, tripped the officer, and B escaped. Is A guilty of a crime?
65. (a) What is the crime of compounding?
(b) What is bribery?
66. Define embracery; barratry.
67. Define maintenance; champerty.
68. How does a riot differ from an unlawful assembly; from a rout?
70. During a strike, A stood in the street and yelled "scab" at strikebreakers. Is he guilty of a crime?
71. A, a physician, after visiting a patient with smallpox, went, without changing his clothes, to visit another patient. Is he guilty of a crime?
72. Define bigamy.
73. A married B. Subsequently, thinking, erroneously, that B was dead, A married C. Subsequently B died. C being still alive, A married X. Is he guilty of bigamy in marrying X?
75. Is knowledge that one spouse is living necessary to constitute bigamy in marrying a second?
76. What is the crime of incest?
77. What is sodomy?
78. How does fornication differ from rape?
79. A, being engaged in a quarrel with B, reached down and picked up a stick from the ground. Is A guilty of an assault on B?
80. Is present ability to inflict injury necessary to an assault?
81. Is intent to injure necessary in assault?
82. What is an aggravated assault?
83. What is a battery?

83-85-86. A said to B, "Hold out your hand; I have a present for you." B held out his hand and A dropped a harmless snake into B's hand, frightening B. Is A guilty of a battery on B?

84. A, a policeman, seeing B lying in the street, and thinking B was drunk, laid hold of him and took him to the police station. B was not drunk, but had fallen in a fit. Is A guilty of a battery on B?

88. What is mayhem?

89. A, desiring to keep B indoors, falsely told B that a constable was hiding outside to arrest him, thus keeping B indoors for several hours. Is A guilty of false imprisonment?

90. Would your answer to the above question be the same if A were an officer detailed to arrest B, and resorted to the scheme mentioned in order to detain B until A could get reinforcements?

91. What is the crime of kidnapping?

92. What is abortion?

93. (a) Define rape.
(b) At what age can a male commit rape?
(c) Can a husband commit rape on his wife?

94-95. What is the nature of the consent that negatives rape?

96. Who are incapable of consent?

97. What amount of resistance by the woman is necessary to prove the commission of rape?

98. (a) What is justifiable homicide?
(b) What is excusable homicide?
(c) What is felonious homicide?

99. A, in attempting to commit suicide, wounded B. Is A guilty of any crime?

100-103. A was standing in the exit of a theatre. An alarm of fire was given within and the audience rushed out. A saw them but stood his ground, and, in consequence, C, one of the audience, was trampled to death. Is A guilty of the death of C?

101. A, a doctor, saw B bleeding to death on the street. A was asked to stop the bleeding, and could have easily done so, but refused. Is A guilty of the death of B?

102. If the death of a person results from the concurrent negligence of A and B, is B liable?
103. A was seriously wounded by B. A was taken to a hospital, where it was decided that an operation was necessary. The operation was successfully performed, but C, the surgeon, accidentally left a sponge in the body of A. A later died from this latter cause. Is B or is C responsible for the death of A?
105. A shot B with a pistol, giving him a mortal wound. While B was dying X cut off B's head. Is A or X, or both, responsible for B's death?
106. When is a person the subject of a homicide?
107. What is murder?
108. Is an intent to kill necessary to constitute murder?
109. While engaged in the commission of a misdemeanor, A accidentally killed B. Is A guilty of murder?
110. A, an officer, in attempting to arrest B was killed by B. A had no warrant, and the crime for which he was arresting B was one that required a warrant to make the arrest legal. Is B guilty of murder?
111. When is a killing through neglect murder?
112. Define murder under the statutes.
113. (a) What is voluntary manslaughter?
(b) What is meant by provocation?
114. A and B being engaged in a quarrel, A called B a liar, whereupon B killed A. Is B's crime murder or manslaughter?
115. Are words ever sufficient provocation to reduce a killing to manslaughter?
116. Is an assault in all cases sufficient to reduce a killing to manslaughter?
117. A, on being truly informed that his wife had just been seen in adultery with B, immediately sought out B and killed him. Of what grade of homicide is A guilty?
118. Is trespass to property sufficient provocation to reduce the killing of the trespasser to manslaughter?
119. What other circumstances will reduce a killing from murder to manslaughter?
120. What degree of homicide is a killing done in mutual combat?

121. What, besides provocation, is necessary to reduce a killing to manslaughter?

122. (a) What kinds of passion will serve to make a killing manslaughter?

(b) What degree of passion is necessary to reduce a killing to manslaughter?

123. A, being knocked down by B, ran home, a distance of one mile, secured a pistol, and hurried back, and shot B. Of what degree of homicide is A guilty?

124. What is involuntary manslaughter?

125. A went into B's house and was there, unlawfully, breaking B's furniture with a hatchet, when the head of the hatchet accidentally flew off and killed B. Of what degree of homicide is A guilty?

126. What is the rule as to a killing done accidentally in playing a game?

127. A was driving an automobile at a greater rate of speed than was allowed by statute, but was not driving recklessly, and ran over a boy. Is A guilty of any degree of homicide?

128. Under what circumstances may one be guilty of manslaughter in killing a person in the doing of a lawful act?

129. A was standing on a wharf and saw B struggling in the water. B told A that he was drowning, and asked A to throw him a rope, which A had in his hand. A refused to do so. B was drowned. Is A guilty of any crime?

130. The rules of A's church forbade the giving of drugs to the sick, providing that instead thereof they should be prayed for. A's son, aged six years, having typhoid fever, A refused to call in a physician, but prayed for the child. The child died, it was testified, as a result of A's refusal to have medical aid. Is A guilty of any crime?

131. Define larceny.

132-133. A barrel of oil was lying on its side. A, intending to steal it, turned it up on its end. Is A guilty of larceny?

134. Is one guilty of larceny if he employ another to steal goods?

135. A gave B a dollar bill, asking B to go out and get it changed. B took the bill and bought himself a hat with it. Is B guilty of larceny?

136. If, in the above case, B had changed the bill, and bought a hat with the change, would he be guilty of larceny?
137. If in question No. 135 B had been a servant of A, would your answer be the same?
138. What is the distinction between custody and possession?
139. A asked B to lend him a rake, intending never to return it. B loaned it to him and A did not return it. Is A guilty of larceny?
140. What is the doctrine of "continuing trespass"?
141. When is a bailee guilty of larceny?
142. A delivered two barrels of apples to B to be taken to the station. B sold and delivered one barrel on the way, and took the other to the station. Is B guilty of larceny?
143. A asked B to sell him a coat, intending never to pay for it. B sold and delivered the coat to A. Is A guilty of larceny?
144-146. When is one guilty of larceny of property which has been lost?
147. When is one guilty of larceny of goods delivered to him by mistake?
148. What kind of goods were the subject of larceny at common law?
149. A went into B's orchard, climbed an apple tree, shook down apples, came down, gathered the apples, put them in his basket, and took them away. Is he guilty of larceny?
150. What animals are the subject of larceny?
151. A had caught a fish in a net and was just about to land it when B took it out of the net. Is B guilty of larceny?
152. A, without permission, filled his pipe from B's tobacco bag. Is A guilty of larceny?
153. Why were choses in action not the subject of larceny?
154. Can one steal property from one who is not the owner?
155. Can one joint owner steal from another?
156. A died, bequeathing his watch to B, his son. C, another son, to whom A had once promised to bequeath the watch, thinking this promise binding in law, secretly took the watch from B. Is C guilty of larceny?
157. A took a whip belonging to B, intending to use it until it was worn out and then to return it. He used it for two

years constantly, and then, it being practically worthless, put it back into B's stable. Is A guilty of larceny?

158. Is a taking to hold for reward larceny?
159. Is a taking with intent to resell to the owner larceny?
160. Is *lucri causa* necessary to larceny?
161. Distinguish larceny from the person from simple larceny.
162. What is necessary to constitute the crime of larceny in a building?
163. What was the object of the statute of embezzlement?
164. What is the distinction between larceny and embezzlement?
165. A employed B to sell clocks. B sold one of the clocks to C. C did not know that B was an agent of A, but thought that B was the owner of the clock. B did not pay over the price of the clock to A. Is B guilty of embezzlement?
166. What persons are embraced in the statute of embezzlement of your state?
167. What property is the subject of embezzlement in your state?
168. What intent is necessary to constitute embezzlement?
169. What was the object of the statute creating the crime of larceny by bailee?
170. In what does the crime of cheating consist?
171. What is a false token?
172. What was the object of the statute creating the crime of obtaining goods by false pretense?
173. What property is the subject of this crime in your state?
174. A obtained the loan of money from B by a false pretense. Is A guilty of obtaining money by false pretense?
175. A, intending to cheat B, obtained money from B by a pretense that A thought was false, but which in fact was true. Is A guilty of obtaining the money by false pretense?
176. Is a false promise a false pretense?
177. A asked B to sell him a horse, falsely saying he would have the money to pay for it in the bank the next day. Is A guilty of obtaining the horse by a false pretense?
178. Is a statement (a) of intention; (b) of opinion; (c) of belief, an indictable false pretense?
179. What is the rule as to "puffing statements"?

180. A sold B iron, falsely representing it to be A-1 iron. There were two qualities of iron, A-1 and A-2. The iron sold was A-2. Is A guilty of obtaining the price by a false pretense?

181-183. A, pretending to be a magician, told B he could tell him where his lost watch was if B would pay him one dollar. B did so. A knew where the watch was and correctly told B. Is A guilty of obtaining the money by a false pretense?

182. A, to pay a wager he had lost, hung a card about his neck which stated that he was blind, and stood on the street corner with his hand extended. B thinking A was blind put a coin in A's hand. Can A be convicted of obtaining the coin by a false pretense?

184. Must the false pretense, to be indictable, be the sole cause inducing the prosecutor to part with his property?

185. What is meant by the pretense being too remote?

186. If the accused intend to return at some future time money he has obtained by the false pretense, can he be convicted?

187. For what purpose must the pretense be made?

188. (a) What was theft-bote?
(b) What are the elements of the crime of receiving stolen goods?

189. A borrowed a horse from B. Subsequently, and while the horse was still in A's possession, A decided to convert it to his own use. A told X of the intention and asked X to hide the horse for him. X did so. Is X guilty of receiving stolen goods?

190. If the stolen goods are received by a servant of A by A's direction, can A be convicted of receiving stolen goods?

191. To constitute this crime is it essential that the goods be received from the thief?

192. A stole goods and delivered them to B to keep for him. B was drunk at the time. Is B guilty of receiving stolen goods?

193. With what intent must the goods be received to make the receiver guilty of receiving stolen goods?

194. What is the crime of robbery?

195. A and B decided to rob X. A decoyed X from X's house to his barn 200 yards distant and then knocked him sense-

less, while B went into X's house and stole his watch. Are A and B guilty of robbery?

196. If the property, when taken, is not in sight of the owner, can the taker be guilty of robbery?
197. What is the nature of the violence in robbery?
198. If the force used is used only for the purpose of securing the property, is this sufficient for robbery?
199. A threatened to kidnap B's son unless B paid him a sum of money. B paid the money. Is A guilty of robbery?
200. A threatened to have B indicted for rape unless he would give him a sum of money. B paid the money. Is A guilty of robbery?
201. Define burglary.
202. What is meant by the term "breaking" in burglary?
203. A, desiring to steal from B's house, gave a false alarm of fire near the house at night. B ran out of the house, leaving the door open. A entered and stole. Is A guilty of burglary?
204-205. A, intending to burn the dwelling of B, pushed the spout of an oil can through the key-hole of a door in the house and poured oil through. Is A guilty of burglary?
206. Need the entry be the same night as the breaking to constitute burglary?
207. What must be the character of the house entered to constitute burglary?
208. Need the house be occupied?
209-210. If a house has once been occupied but is abandoned at the time of the entry, is such entry burglary if accompanied by a breaking?
211. Is it necessary, to constitute burglary, that the house be occupied by the owner?
212. Can burglary be committed in a house used in part as a dwelling and in part as a shop?
213. Can burglary be committed in an outhouse?
214. What intent is necessary in burglary?
215. When must the breaking be done in burglary?
216. (a) Define arson.
(b) How extensive must the burning be in arson?
217. (a) What must be the character of the place burnt in arson?

(b) Can a person be guilty of arson in burning a house owned by himself?

218. When can one be guilty of arson in burning a house in which he is living?

219. A set fire to B's house through gross negligence. Is he guilty of arson?

220. How have statutes in your state changed the crime of arson?

221. Define forgery.

222. What instruments are the subject of forgery?

223-224. (a) A painted a picture and signed to it the name of a celebrated living painter. Is he guilty of forgery?

(b) Is the false making of an instrument void on its face forgery?

225. How close must the resemblance be of the forged to the true instrument?

226. What is the act necessary in forgery?

227. A signed a check in blank in favor of B and told B to fill it in to any amount under $200. B filled it in for $500. Is he guilty of forgery?

228. Under what circumstances can one be guilty of forgery by signing his own name?

229. Is A guilty of forgery in signing B's name to a note, adding thereto, "by A, agent for B"?

230. What is the intent necessary in forgery?

231. What is the offense of uttering a forged instrument?

232. What is the crime of libel?

233. Can a dead person be libeled?

234. What is meant by the publication of a libel?

235. What communications are privileged?

QUIZ QUESTIONS

LAW OF CRIMINAL PROCEDURE

(*The numbers refer to the numbered sections in the text.*)

1. Distinguish Criminal Procedure from Civil Procedure.
2. What are the sources of the criminal law?
3. What is meant by jurisdiction?
4. When a crime is committed on a river forming the boundary between two states, where is the jurisdiction of the offense?
5. A crime is committed on board an English warship lying at anchor in New York harbor; where is the place of trial?

6-7. What courts have criminal jurisdiction?

8. A pirate ship flying (unlawfully) the German flag is captured by a U. S. cruiser in mid-ocean. Where may the prisoners be tried?
9. Can jurisdiction be conferred upon a court by consent of the parties?
10. What is meant by venue?
11. Burglary is committed in the county of "A." The criminal carries the property stolen into the county of "B" and conceals it there. Where is the venue?
12. What are the grounds for change of venue?

13-14. What are the four different modes of accusation?

15-16. When, if ever, may an arrest be made without a warrant?

17-19. What is the procedure in order to extradite a fugitive criminal from a foreign country?

20. What is meant by the preliminary examination?
21. What is meant by "bail"?
22. Does a constitutional right to trial by jury mean that one can demand a jury when on trial in a police court?

23. What is the difference between an indictment and an information?
24. Describe what is meant by the grand jury.
25-30. Explain the parts of an indictment.
31. (a) Must an indictment be signed? (b) If so, by whom?
32-33. What degree of certainty in pleading is required in indictments?
34. State the rule as to the use of abbreviations in indictments.
35-36. One William Browne is indicted under the name of William Brown. Does this affect the indictment?
37. What are the requirements for alleging time and place of a crime?
38. Explain the use of the phrase "then and there" in indictments.
39. How should the name of third persons be alleged?
40. Describe the method of alleging intent and knowledge.
41. What is meant by "words of art"?
42-43. How should statutory offenses be alleged?
44. How should property be described in indictments?
45. Distinguish between the use of the words "tenor" and "purport."
46. What is meant by the inducement?
47. What offenses may be joined in an indictment?
48. What is surplusage?
49. What is the rule as to amending indictments or informations?
51. What is a bench warrant?
52. What is the effect of a plea of *nolo contendere*?
53. What is meant by preliminary motions?
54-55. Distinguish a motion to quash from a demurrer.
56. What is meant by a plea to the jurisdiction and when is it used?
57. When may the plea in abatement be made use of?
58. (a) What is meant by a plea in bar? (b) Name the principal pleas in bar.
59-60. What is meant by "twice in jeopardy"?
61. What is meant by "entry of nolle prosequi"?
62. What are the accused's rights before the trial?
63. How is a jury selected?
64. Explain what is meant by impanelling the jury.

65. What is the oath taken by the jury?
66-72. What in general are the constitutional rights of an accused person at his trial?
73. Outline the usual order of procedure in a criminal trial.
74. Upon whom is the burden of proving an alibi?
75. What, in general, is meant by "reasonable doubt"?
76. Mention some general principles to be observed in charging a jury in a criminal case.
77. May the jury take into the jury room any books or papers?
78. Describe the process of receiving the verdict of the jury.
79. What is meant by polling the jury?
80-83. Distinguish between a motion for a new trial and a motion in arrest of judgment.
84. Who decides what the sentence shall be, the court or the jury?
85-86. What is a writ of error?
87. What is the office of a bill of exceptions?
88. What is a writ of certiorari?
89. What is an appeal?
90. Describe the appellate procedure in federal courts.
91. How are criminal appeals taken in England?

QUIZ QUESTIONS

LAW OF PERSONS AND DOMESTIC RELATIONS

(The numbers refer to the numbered sections in the text.)

1-2. What is the distinction between common law and statutory law?

3. Why is it that the state is called *parens patriæ?*

4. In a divorce proceeding, both the father and mother laid claim to the child. The child was 4 years of age. Who is entitled to its custody?

5. Has a school teacher the right to chastise her pupils? Give full explanation.

6. Under what circumstances may the state deprive parents of the custody of their children?

7. Is a parent liable to a tradesman for value of food given to the child by the tradesman?

8. A child 16 years of age obtains employment as office boy in an office. To whom shall the employer pay the boy's salary?

9. Suppose a child is injured in a railroad wreck, to what extent is the parent entitled to recover from the railroad company on account of the injury?

10. Suppose the child was instantly killed. Would the answer to question 9 be any different? Explain fully.

11. A's daughter, age 17, was seduced by B's son, while she was in the employ of B as servant girl. What are A's rights?

12. What are the rights of a foster parent for injury sustained by the foster child? What are the rights as to earnings?

13-15. Give five modes of emancipation. Is emancipation revocable or irrevocable? Give explanation.

16. What are the rights of an illegitimate?
17-18. What right has an adopted child to inherit from the adopting parent?
19. To what extent do the rules applicable to parent and child, apply to step-children?
20. If a parent administers an excessive whipping to the child, what remedy has the child against the parent?
21. A child 12 years of age, while at play in his father's yard, throws a stone through the neighbor's window. Is the father liable?
22-23. When does one become of age? Give the reason.
24. What is meant by void and voidable acts of infants?
25-26. What was the rule at common law, where an infant bought a horse, and then sold him before paying therefor? What would be the adult's remedy to secure payment?
27-28. How far would estoppel apply in the above questions?
29-30. When may an infant ratify his contracts and how may ratification be made?
31-32. A person 17 years of age bought some food for his own consumption and gave a promissory note therefor. When the owner of the note sued upon it, the maker set up infancy as a defense. Is this good? State reasons.
33. What is the rule relative to leases of infants?
34. Can a minor contract a valid contract of marriage? State reasons.
35-36. Suppose that an infant, in taking out an insurance policy, makes misrepresentation as to his health. Is the beneficiary thereby precluded from obtaining the insurance after the infant's death?
37. May an adult elect to disaffirm a contract made with an infant?
38-41. What is the rule relative to the infant's right to disaffirm a contract and then to recover what he paid: (a) where he bought and paid for candy which he consumed; (b) where he bought and paid for real estate; (c) where he bought a horse and still possesses the animal? What constitutes disaffirmance of an infant's deed conveying real estate?
42-43. When must an infant exercise his right to disaffirm his deed of real estate?

44. State the two rules relative to the infant's right to disaffirm his contract of purchase for cash and demand back the cash, where he no longer has the purchase.

45-46. What is meant by the rule that the right to disaffirm is personal to the infant?

47-48. May an infant who has received as part payment for services various items of luxury which he consumed, thereafter disaffirm his contract and demand the value of the services in money regardless of what he had consumed? State reasons.

49. What is the rule relative to infants' contracts of partnership?

50. May an infant employ counsel? If so, is he bound to the same extent by an attorney's acts, as an adult would be? Explain fully.

51. An infant's agent arranged for the sale of a horse to the infant. At majority the erstwhile infant tendered the purchase money to the adult, and the adult refused to deliver the horse. What is the infant's remedy?

53-54. What is the rule as to an infant's liability for torts? State fully.

55. State and explain the three rules relative to an infant's responsibility for crimes, and give illustrations of each.

56. Can an infant make a will?

57. Can an infant be a witness in a law suit?

58. May an infant occupy an official position? State fully.

59-60. In what respects does marriage differ from any ordinary contract?

61. Define, explain and discuss the executory agreement to marry. What is the usual consideration in this contract? How may it be proven?

62. What is meant by a suit for breach of promise? When is the incapacity of the defendant to fulfill the promise a defense to the suit?

63. Name some of the things which will excuse the breach of promise to marry.

64. Define and distinguish between void and voidable marriages. What is the effect of a voidable marriage when set aside?

65-66. What is meant by consanguinity? By affinity? Explain

fully the prohibited degrees under the statute of 32 Hen. VIII. Within what degree of relationship are persons prohibited from marrying in your state?

67. What may be said as to civil or social position as a disqualification to marriage? What races are forbidden to intermarry in some states?
68. Upon what ground is mental capacity required in parties to the marriage contract? What, in general, is the test of capacity? What may be said of drunkenness as incapacitating? What is the effect of mental incapacity upon the marriage?
69. What is meant by physical capacity to contract marriage?
70. What is the marriageable age at common law? By statute in your state? What effect has infancy, or non-age, upon the marriage contract? How may the marriage of an infant be ratified or disaffirmed?
71. What effect has a prior marriage undissolved upon a subsequent marriage?
72. A man marries a woman he had wronged in consideration of her agreement not to prosecute him. May he subsequently set aside this marriage on the ground of force? Suppose he was mistaken in his belief that he was the cause of the woman's condition. Would the answer be different?
73. Is a ceremonial marriage required by the common law? What are the two ways of expressing consent to the marriage at common law? Does the common law marriage ceremony still prevail? Discuss fully.
74. What may be said of statutory formalities in the marriage celebration? What are the requirements in your state? Will the marriage be invalid if these are not observed? When will a statute requiring formalities invalidate the marriage if these formalities are not observed?
75. May minors marry? What conditions do statutes commonly impose as to their marrying?
76. Discuss foreign marriages? When are they valid? When invalid? What is the general rule?
77. What may be said of the family? Which spouse was regarded as the head of the family? Discuss the status of the wife at the common law. Does the theory of the common law in regard to the wife still prevail?

78-81. What are the respective duties of the husband and wife?

82. May a husband ever testify as to conversations had with his wife? May he ever testify in a suit in which the wife is plaintiff or defendant? May a wife ever testify in either of the above situations?

83-87. What were the husband's rights in the wife's property at common law? What were his rights in her personal property and choses in action? What were his rights in equity, prior to statutory changes? What changes were made by statutes?

88. (a) Did the husband have any right at common law to sue for a personal injury to his wife? What was the nature of it? (b) What right did he have to the earnings of the wife?

89. Under statutes entitling the wife to all her earnings, what right has a husband to sue on account of a personal injury sustained by the wife?

90. What right has the wife to recover on account of interference with her relations with her husband?

91. When is there emancipation of the wife?

92. (a) What right had the wife at common law to sue for injuries to her person, on her own account? (b) What change, if any, was effected by statute?

96. Had the wife a right at common law to pledge the husband's credit?

97. What right had she to sue him for money paid for living expenses?

98. How have statutes affected the situation in the two preceding questions?

99. What is family expense?

100-102. Could a married woman make a contract at common law? Could she make a contract in equity, and if so, to what extent? Can she make contracts under the statutes affecting married women?

103-106. Did a married woman have power to convey real estate at common law? To what extent could she convey in equity? To what extent could she convey under statutes?

107-109. Give a brief history of married women's power to make wills.

110-111. (a) What is the rule of estoppel as applied to married women both at common law and under the statutes? (b) Suppose a married woman deeds property and the grantee accepts the deed and pays for the property relying on the woman's statement that she is a widow. Is the deed good?

112. What is the law relative to a married woman's liability for torts and crimes that she commits?

113-114. Can a wife sue the husband on a promissory note given by the husband to the wife?

115-117. What can be said of contracts and conveyances of land between husband and wife, at common law, in equity and under statute?

119-120. Can a husband or a wife be guilty of stealing, one from the other, or of committing a trespass, one against the property of the other?

121-122. Explain estates by entireties and show wherein they differ from joint tenancies.

123-129. State the four most common grounds for divorce and explain how each may be shown so as to entitle to a divorce.

130-134. State the four defenses to a suit for divorce and show when and how each defense should be made.

135-137. What is the practical difference between temporary and permanent alimony?

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PART I

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CHAPTER I.

THE SUBJECT OUTLINED AND DEFINED.

Sources of the Criminal Law.

COMMONWEALTH v. CHAPMAN ET AL.

13 Metc. 68 (Mass.). 1847.

SHAW, C. J. This was an indictment against the defendants for a false and malicious libel, tried before the court of common pleas, and, upon a conviction there, the case is brought before this court, upon an exception which has been most elaborately argued by the learned counsel for the defendants, and which, if sustained, must go to the foundation of the prosecution, namely, that there is no law of this commonwealth by which the writing and publishing of a malicious libel can be prosecuted by indictment, and punished as an offence. The proposition struck us with great surprise, as a most startling one, but, as it was seriously presented and earnestly urged in argument, we felt bound to listen and give it the most careful consideration; but, after the fullest deliberation, we are constrained to say that we can entertain no more doubt upon the point than we did when it was first offered.

It is true that there is no statute of the commonwealth declaring the writing or publishing of a written libel, or a malicious libel by signs and pictures, a punishable offence. But this

goes little way towards settling the question. A great part of the municipal law of Massachusetts, both civil and criminal, is an unwritten and traditional law. It has been common to denominate this "the common law of England," because it is no doubt true that a large portion of it has been derived from the laws of England, either the common law of England, or those English statutes passed before the emigration of our ancestors, and constituting a part of that law by which, as English subjects, they were governed when they emigrated; or statutes made afterwards, of a general nature, in amendment or modification of the common law, which were adopted in the colony or province by general consent. * * *

To a very great extent the unwritten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights are established and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duty redressed and punished. Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial and impracticable system. Even in many cases where statutes have been made in respect to particular subjects, they could not be carried into effect, and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter, the statute declares the punishment; but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment provided, the common law furnishes its ready aid, prescribing the mode of prosecution by indictment, the common-law punishment of fine and imprisonment. Indeed, it seems to be too obvious to require argument that without the common law our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry as a system of municipal law. * * *

That there is such a thing as a common or unwritten law of Massachusetts, and that, when it can be authentically established and sustained, it is of equal authority and binding force with the statute law, seems not seriously contested in the argument before us. But it is urged that in the range and scope of this unwritten law there is no provision which renders the writing

or publishing of a malicious libel punishable as a criminal offence. * * *

When our ancestors first settled this country, they came here as English subjects; they settled on the land as English territory, constituting part of the realm of England, and of course governed by its laws; they accepted charters from the English government, conferring both political powers and civil privileges; and they never ceased to acknowledge themselves English subjects, and never ceased to claim the rights and privileges of English subjects, till the Revolution. It is not, therefore, perhaps, so accurate to say that they established the laws of England here as to say that they were subject to the laws of England. When they left one portion of its territory, they were alike subject, on their transit and when they arrived at another portion of the English territory; and therefore always, till the Declaration of Independence, they were governed and protected by the laws of England, so far as those laws were applicable to their state and condition. Under this category must come all municipal laws regulating and securing the rights of real and personal property, of person and personal liberty, of habitation, of reputation and character, and of peace. The laws designed for the protection of reputation and character, and to prevent private quarrels, affrays, and breaches of peace, by punishing malicious libel, were as important and as applicable to the state and condition of the colonists as the law punishing violations of the rights of property, or person, or of habitation; that is, as laws for punishing larceny, assault and battery, or burglary. Being part of the common law of England, applicable to the state and condition of the colonists, they necessarily applied to all English subjects and territories, as well in America as in Great Britain, and so continued applicable till the Declaration of Independence.

This, therefore, would be evidence, a priori, that they were in force, and were adopted by the clause cited from the constitution, except so far as modified by the excepting clause. * * *

These declarations of the legislature, and the contemporary exposition of the constitution by the older judges, immediately after its adoption, together with an uninterrupted course of judicial practice to the present time, form a body of proof that the common law, making the publication of a malicious libel a

criminal offence, has been adopted in this commonwealth, entirely conclusive and irrefragable; and he must be a bold judge, who should venture to decide that there is not now, and never has been, any such law, and that all the judgments which have been pronounced by the courts of this state, on conviction for this offence, have been erroneous.

Exceptions overruled.

UNITED STATES v. HUDSON ET AL.

7 Cranch 32 (U. S.). 1812.

This was a case certified from the circuit court of the United States for the district of Connecticut, in which, upon argument of a general demurrer to an indictment for a libel on the president and congress of the United States, contained in the Connecticut Courant, of the 7th of May, 1806, charging them with having in secret voted $2,000,000 as a present to Bonaparte, for leave to make a treaty with Spain, the judges of that court were divided in opinion upon the question, whether the circuit court of the United States had a common law jurisdiction in cases of libel.

JOHNSON, J. The only question which this case presents is, whether the circuit courts of the United States can exercise a common law jurisdiction in criminal cases. We state it thus broadly, because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute.

Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition.

The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several states. Whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions. That power

is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only, the supreme court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer.

It is not necessary to inquire whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation.

And such is the opinion of the majority of this court. For the power which congress possesses to create courts of inferior jurisdiction necessarily implies the power to limit the jurisdiction of those courts to particular objects; and when a court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction much more extended, in its nature very indefinite, applicable to a great variety of subjects, varying in every state in the Union, and with regard to which there exists no definite criterion of distribution between the district and circuit courts of the same district?

The only ground on which it has ever been contended that this jurisdiction could be maintained is that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it. But, without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But, if admitted as applicable to the state of things in this country, the consequence would not result from it which is here

contended for. If it may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.

Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is *not* within their *implied powers.*

PART II

THE ELEMENTS OF CRIME

CHAPTER II.

THE ACT.

Necessity for Act.

REX v. HEATH.

Russ. & R. 183 (Eng.). 1810.

This case stood for trial before Mr. Justice Bayley, at the Lent assizes for the county of Warwick, in the year 1810; but as the learned judge thought it questionable whether the facts constituted any offence, and as the defendant was out upon bail, he postponed the trial by consent, that the opinion of the judges might in the meantime be taken upon the case.

The indictment contained three counts—one for uttering counterfeit money; a second, for having it in his possession, knowing it to be counterfeit, with intent to circulate and put off the same among the liege subjects of our lord, the king, and to defraud them; and a third, for having it in his possession knowingly, designedly and illegally, knowing it to be counterfeit.

The only act of uttering was delivering a box packed up, containing 2,800 bad shillings, and 1,000 bad sixpences at a coach office at an inn at Birmingham, addressed to a man at Glasgow, and the uttering was stated to be to the bookkeeper at the inn.

The box was stopped at the inn.

The following authorities were referred to in support of the second and third counts: Rex v. Sutton, Cas. Hardw. 370; Rex v. Scofield, Cald. 397; and Rex v. Higgins, 2 East 5.

In Easter term (31st May, 1810) this case was taken into consideration, all the judges being present. They relied much upon the authority of Rex v. Sutton, and the cases there cited,

in forming their opinion, and were then inclined to think this a misdemeanor, as stated in the second count. But, on considering this case again on the first day of Trinity term ensuing, the majority of the judges seemed to be of opinion that, "having in his possession" with the term "knowingly," etc., annexed to it, could not be considered an act, and that an intent without an act was not a misdemeanor, and they considered the case of Rex v. Sutton as untenable.

Consent to the Act by the Person Injured.

STATE v. COVINGTON.

2 Bailey 569 (S. C.). 1832.

This was an indictment under the Act of 1754, P. L., 236, for inveigling and stealing a slave named Dick, the property of Jacob Suber, with a third count for aiding the said slave in running away, etc. The jury, under charge of the Court, found the defendant guilty; and he now moved to set aside the verdict, and for a new trial.

JOHNSON, J. I come now to the consideration of, I think, the most important question which arises out of the grounds of this motion. The owner, or rather his family in his absence, which I regard as equivalent, knew of and had assented to the negro's meeting the prisoner and arranging with him their plan of elopement, and moving forward in the execution of it; and the question is, whether the owner, under the circumstances, can be said to be "deprived of the use and benefit" of the slave, within the meaning of the Act.

In considering this question, it will be necessary to recur again to the analogy between the crimes of inveigling, and stealing, a slave, in relation to the effect on the owner, the loss of use and benefit, for the purpose of applying the rules of law. In larceny, the primary inquiry is, whether the taking were *invito domino,* or without the will or approbation of the owner; 2 East's P. C., 665, and so of inveigling a slave. If, therefore, one consent that another shall take his goods, or by his own act procure them to be taken, such taking is not larceny. But I apprehend, that the knowledge that they are to be taken, does

not constitute evidence of such consent or approbation. Thus, if one, who has goods exposed, knows that a thief intends to take them, but neglects to watch or secure them, this neglect is in some sort an assent to the taking by the thief; but the act is not in pursuance of the will, or approbation of the owner, but the voluntary act of the thief. A few cases will serve to illustrate the principle.

In McDaniel's case, 2 East's P. C., 665, one Salmon had conspired with McDaniel and other persons, to procure himself to be robbed by two others, who were ignorant of the design, for the purpose of procuring the reward given by Act of Parliament for apprehending robbers on the highway; and it was held that the robbery, under such circumstances, did not constitute felony. The obvious reason is, that the act was procured to be done by the party complaining, and in pursuance of his will and approbation.

But in Norden's case, 2 East's P. C., 666, where one knowing that a highway robber frequented a particular place, put himself in his way, and upon being attacked by the highwayman gave him his money, and afterwards seized him, it was held to be robbery in the highwayman; for the act was not procured by the prosecutor nor done according to his will, but proceeded from the voluntary act of the prisoner. * * *

The principle inculcated in these cases appears to me to have a direct application to the case in hand. Every act of the prisoner proceeded from his own mere motion, without any agency on the part of the owner of the slave. His not preventing the thing, when he knew of it beforehand, is not evidence of the assent of his will, but is only an apparent assent. The act was therefore *invito domino*, and constituted felony.

Motion refused.

Coercion as Affecting Act.

ARP v. STATE.

97 Ala. 5. 1893.

COLEMAN, J. At the July term, 1892, of the Circuit Court, the defendant was convicted of murder in the first degree, and sentenced to suffer death.

On this phase of the evidence the court was asked to give the following charge: "If the jury believe from the evidence that the defendant killed Pogue under duress, under compulsion from a necessity, under threats of immediate impending peril to his own life, such as to take away the free agency of the defendant, then he is not guilty." The court refused this charge, and the refusal is assigned as error. This brings up for consideration the question, what is the law when one person, under compulsion or fear of great bodily harm to himself, takes the life of an innocent person; and what is his duty when placed under such circumstances?

The fact that defendant had been in the employment of Burkhalter is no excuse. The command of a superior to an inferior, of a parent to a child, of a master to a servant, or of a principal to his agent, will not justify a criminal act done in pursuance of such command.—1 Bishop, § 355; Reese v. State, 73 Ala. 18; 4 Blackstone, § 27.

In a learned discussion of the question, to be found in Leading Criminal Cases, Vol. 1, p. 81, and note on p. 85, by Bennett & Heard, it is declared that "for certain crimes the wife is responsible although committed under the compulsion of her husband. Such are murder," etc. To the same effect is the text in 14 Am. & Eng. Encyc. of Law, p. 649; and this court gave sanction to this rule in Bibb v. State, 94 Ala. 31; 10 So. Rep. 506. In Ohio a contrary rule prevails in regard to the wife.—Davis v. State, 15 Ohio, 72; 45 Amer. Dec. 559. In Arkansas there is a statute specially exempting married women from liability, when "acting under the threats, commands or coercion of their husbands," but it was held under this act there was no presumption in favor of the wife accused of murder, and that it was incumbent on her to show that the crime was done under the influence of such coercion, threats or commands."—Edwards v. State, 27 Ark. 493, reported in 1 Criminal Law by Green, p. 741. * * *

The authorities seem to be conclusive that, at common law, no man can excuse himself, under the plea of necessity or compulsion for taking the life of an innocent person.

Our statute has divided murder into two degrees, and affixed the punishment for each degree, but in no respect has added to or taken away any of the ingredients of murder as known at

common law.—Mitchell v. State, 60 Ala. 26; Fields v. State, 52 Ala. 352.

That persons have exposed themselves to imminent peril and death for their fellow man, and that there are instances, where innocent persons have submitted to murderous assaults and death rather than take life is well established, but such self sacrifices emanated from other motives than the fear of legal punishment. That the fear of punishment by imprisonment or death at some future day by due process of law can operate with greater force to restrain or deter from its violation, than the fear of immediate death, unlawfully inflicted, is hardly reconcilable with our knowledge and experience with that class of mankind, who are controlled by no other higher principle than fear of the law. Be this as it may, there are other principles of law, undoubtedly applicable to the facts of this case, and which we think can not be ignored.

The evidence of the defendant himself shows that he went to Burkhalter's house about nine o'clock of the night of the killing, and there met Burkhalter and Leith, and that it was there, and at that time, they told him he must kill Pogue. The evidence is not clear as to how far it was from Burkhalter's to Pogue's dwelling, where the crime was perpetrated; but it was sufficient to show that there was some considerable distance between the places, and he testifies as they went to Pogue's, they went by the mill and got the axe, with which he killed him. Under every principle of law, it was the duty of the defendant to have escaped from Burkhalter and Leith, after being informed of their intention to compel him to take the life of Pogue, as much so as it is the duty of one who had been compelled to take up arms against his own government, if he can do so with reasonable safety, to himself; or of one assailed to retreat, before taking the life of his assailant. Although it may have been true, that at the time he struck the fatal blow, that he had reason to believe he would be killed by Burkhalter and Leith, unless he killed Pogue, yet, if he had the opportunity, if it was practicable, after being informed at Burkhalter's house of their intention, he could have made his escape from them with reasonable safety, and he failed to do so, but remained with them until the time of the killing, the immediate necessity or compulsion under which he acted at that time would be no excuse to him. As to

whether escape was practicable to defendant, as we have stated, was a question of fact for the jury. The charge, numbered 1 and refused by the court, ignored this principle of law and phase of evidence, and demanded an acquittal of defendant, if at the time of the killing the compulsion and coercion operated upon the defendant, and forced him to the commission of the act, notwithstanding he might have avoided the necessity by escape before that time. We do not hesitate to say he would have been justifiable in taking the life of Burkhalter and Leith, if there had been no other way open to enable him to avoid the necessity of taking the life of an innocent man. The charge requested was erroneous and misleading, in the respect that it ignored the law and evidence in these respects.

The second charge requested was properly refused. We suppose the principle asserted is exactly the contrary of that intended. By the use and position of the negatives the charge is made to assert that unless there was a present impending necessity to strike, there could be no murder.

There is no error in the record.

It appearing that the day appointed for the execution of the sentence has passed, it is considered and ordered that Friday, the 10th of March next (1893), be and is hereby appointed and specified for the execution of the sentence of the law pronounced by the trial court, and the sheriff or his deputy, or the officer acting in his place, must execute the sentence.

Affirmed.

COMMONWEALTH v. NEAL.

10 Mass. 152. 1813.

The defendants, being husband and wife, were indicted, at the last October term in this county for an assault and battery. Upon a trial which was had at the same term before Thatcher, J., the jury found the said John guilty; and as to the said Elizabeth they found specially: "That she committed the assault and battery charged in the indictment in company with and commanded by the said John Neal, her husband. And if this, in law, will make her guilty, then the jury find her guilty; but, if being in company with and commanded by her husband will

justify or excuse her in law, then the jury find that the said Elizabeth Neal is not guilty."

The indictment was continued to this term for judgment upon this verdict, and now—

Mr. Whitman argued that the wife, acting under the direction and coercion of the husband, was not personally liable to conviction and punishment, and this immunity extends to every case, except those of keeping a bawdy house and a gaming house. The jury have found that the wife, in this case, acted by the command of her husband.

Attorney General Morton, for the Commonwealth. The law excuses the wife only in cases where she may be supposed ignorant of the criminality of the act; as in larceny, &c., she may not know in whom the property of the goods is. The husband's commands are no excuse for her where she must know, as well as he, that the action is wrong; as in the case at bar, where she could not be ignorant that it was unjustifiable to beat and wound her neighbor.

CURIA. The general doctrine is that a feme covert incurs no legal guilt by the commission of civil offenses by the coercion of her husband, or even when in his presence. To this general rule there are certain exceptions,—as of crimes forbidden by the law of nature, which are mala in se, and some where the wife may be presumed the principal agent. The case at bar is not within the exceptions, and Elizabeth Neal is not guilty, and must therefore be discharged.

CHAPTER III.

THE INTENT.

Intent in General.

PEOPLE v. ROBY.

52 Mich. 577. 1884.

COOLEY, C. J. The respondent, who is keeper of a hotel in the village of Plainwell, in which there is a bar for the sale of spirituous and malt liquors, was prosecuted and convicted for not keeping his bar closed on Sunday, May 6, 1883. The evidence was that on the morning of that day the clerk of the hotel was in the bar-room and had a servant with him scrubbing it out when a person came in from the street. He appeared to be known to the clerk, who told him he did not want him there Sundays. The man said he wanted some whisky. The clerk told him he must get his whisky Saturday night. After some more words between them the clerk told him if he was going to get the whisky to get it and get out as soon as he could. He got the whisky, handed pay for it to the servant, and went off. The respondent was not at the time present. The clerk testifies that he was somewhere about the house, but he thought he was not up yet; the servant says he was about there shortly afterwards. There was no evidence in the case to show that respondent assented to the opening of the bar on that day, or expected or desired that it should be opened; neither was there any evidence to the contrary. He was not a witness on his own behalf.

The case comes to this Court on writ of error, and the only question of importance is whether there was any evidence to be submitted to the jury.

The statute under which the conviction was had provides that "all saloons, restaurants, bars, in taverns or elsewhere, and all other places where any of the liquors," etc., "may be sold or kept for sale, either at wholesale or retail, shall be closed on the

first day of the week, commonly called Sunday," etc. How. St. § 2274; Public Acts, 1881, p. 350.

It will be observed that the requirement that the saloons and other places mentioned shall be closed is positive. The next section of the statute provides that any person who shall violate this, among other provisions, shall be deemed guilty of a misdemeanor, and shall be punished as therein prescribed. In terms, then, the penalties of the statute are denounced against the person whose saloon or other place for the sale of intoxicating drinks is not kept closed, and no other fact is necessary to complete the offense.

It is contended, nevertheless, that to constitute an offense under the section referred to, there must be some evidence tending to show an intent on the part of the respondent to violate it. * * *

I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence; and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. Thus, in Massachusetts a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating; Commonwealth v. Boynton, 2 Allen, 160; and of the offense of selling adulterated milk, though he was ignorant of its being adulterated. Commonwealth v. Farren, 9 Allen, 489; Commonwealth v. Holbrook, 10 Allen, 200; Commonwealth v. Waite, 11 Allen, 264; Commonwealth v. Smith, 103 Mass., 444. See State v. Smith, 10 R. I. 258. In Missouri a magistrate may be liable to the penalty for performing the marriage ceremony for minors without consent of parents or guardians, though he may suppose them to be of the proper age. Beckham v. Nacke, 56 Mo., 546. Where the killing and sale of a calf under a specified age is prohibited, there may be a conviction though the party was ignorant of the animal's age. Commonwealth v. Raymond, 97 Mass., 567. * * *

If intent were necessary to be found I should be of opinion

there was enough in the case to warrant its submission to the jury. The bar was opened on Sunday by respondent's servants and on his business while he was about the premises. The purpose for which it was opened was immaterial; the offense was committed by opening it for cleaning as much as it would have been by opening it for the sale of liquors. People v. Waldvogel, 49 Mich., 337. But the statute requires the proprietor at his peril to keep the bar closed. The purpose in doing so is that persons shall not be there within the reach of temptation. This respondent did not keep his bar closed and he has therefore disobeyed the law. And he has not only disobeyed the law, but the evil which the law intends to guard against has resulted; that is to say, there has been, either with or without his assent,—it is immaterial which,—a sale of intoxicating liquors to a person who took advantage of the bar being open to enter it.

I think the circuit court should proceed to judgment.

Constructive Intent.

COMMONWEALTH v. ADAMS.

114 Mass. 323. 1873.

Complaint for assault and battery.

At the trial in the Superior Court, before Bacon, J., it appeared that the defendant was driving in a sleigh down Beacon Street, and was approaching the intersection of Charles Street, when a team occupied the crossing. The defendant endeavored to pass the team while driving at a rate prohibited by an ordinance of the city of Boston. In so doing, he ran against and knocked down a boy who was crossing Beacon Street. No special intent on the part of the defendant to injure the boy was shown. The defendant had pleaded guilty to a complaint for fast driving, in violation of the city ordinance. The Commonwealth asked for a verdict, upon the ground that the intent to violate the city ordinance supplied the intent necessary to sustain the charge of assault and battery. The court so ruled, and thereupon the defendant submitted to a verdict of guilty, and the judge, at the defendant's request, reported the case for the determination of this court.

ENDICOTT, J. We are of opinion that the ruling in this case cannot be sustained. It is true that one in the pursuit of an unlawful act may sometimes be punished for another act done without design and by mistake, if the act done was one for which he could have been punished if done wilfully. But the act, to be unlawful in this sense, must be an act bad in itself, and done with an evil intent; and the law has always made this distinction: that if the act the party was doing was merely *malum prohibitum,* he shall not be punishable for the act arising from misfortune or mistake; but if *malum in se,* it is otherwise. 1 Hale P. C. 39; Foster C. L. 259. Acts *mala in se* include, in addition to felonies, all breaches of public order, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done wilfully or corruptly. Acts *mala prohibita* include any matter forbidden or commanded by statute, but not otherwise wrong. 3 Greenl. Ev. § 1. It is within the last class that the city ordinance of Boston falls, prohibiting driving more than six miles an hour in the street.

Besides, to prove the violation of such an ordinance, it is not necessary to show that it was done wilfully or corruptly. The ordinance declares a certain thing to be illegal; it therefore becomes illegal to do it, without a wrong motive charged or necessary to be proved; and the court is bound to administer the penalty, although there is an entire want of design. The King v. Sainsbury, 4 T. R. 451, 457. It was held in Commonwealth v. Worcester, 3 Pick. 462, that proof only of the fact that the party was driving faster than the ordinance allowed was sufficient for conviction. See Commonwealth v. Farren, 9 Allen, 489; Commonwealth v. Waite, 11 Allen, 264. It is therefore immaterial whether a party violates the ordinance wilfully or not.

The offense consists, not in the intent with which the act is done, but in doing the act prohibited, but not otherwise wrong. It is obvious, therefore, that the violation of the ordinance does not in itself supply the intent to do another act which requires a criminal intent to be proved. The learned judge erred in ruling that the intent to violate the ordinance in itself supplied the intent to sustain the charge of assault and battery. The verdict must therefore be set aside, and a new trial granted.

Specific Intent.

McGEHEE v. STATE.

62 Miss. 722. 1885.

Appeal from the circuit court of Amite county; J. B. Chrisman, Judge. * * *

ARNOLD, J. Appellant was convicted of assault with intent to kill and murder Levi Thompson, and sentenced to one year's imprisonment in the penitentiary. At a public gathering, about 12 o'clock at night, one George Morris had a difficulty with appellant's brother, and cut and seriously wounded him. Afterwards Morris started home and appellant followed him, intending, it seems, to avenge the injury suffered by his brother. It was a very dark night, and appellant overtook Levi Thompson in the road, who had started before him, going in the same direction, and, supposing him to be George Morris, cut and dangerously wounded him with a knife. As soon as Thompson was struck, he spoke, and appellant desisted, and ran rapidly away. It was so dark that Thompson could not see or tell who it was that struck him. On the next morning appellant admitted that he was the person who cut Thompson, and said he thought he was cutting George Morris; that he did not intend to cut Thompson, and was sorry he had mistaken him for Morris; and that, if it had been Morris, he would have cut him to pieces. Appellant and Thompson were the best of friends, and there had never been any difficulty between them before. It is urged for appellant that the intent charged was not proved.

Thompson was the only person in reach of appellant at the time he committed the offense with which he is charged. He intended to assault that person with a weapon which the jury found to be a deadly weapon. His blows did not miss the object at which they were aimed. He may not have intended to kill Thompson, but he was properly convicted if he intended to kill the man at whom the knife was directed. The evil and specific intent to strike the form before him at the time is manifest, and that form proved to be Thompson. That there was a mistake as to the identity of the person intended to be injured constitutes no defense. If appellant did to Thompson what he

intended to do to Morris, he is as guilty, under the statute, as if no mistake had been made. 2 Whart. Cr. Law, § 1279; 1 Russ. Crimes (9th Ed.) 1001, 1002; Reg. v. Smith, 33 Eng. Law & Eq. 567; Reg. v. Lynch, 1 Cox. Cr. Cas. 361.

And this is not in conflict with the settled doctrine in this state that on a charge under the statute, of assault with a deadly weapon, with intent to kill and murder a particular person, it is necessary to prove the specific intent as laid in the indictment. There is no error in the record.

The judgment is affirmed.

Intent Distinguished from Motive.

UNITED STATES v. HARMON.

45 Fed. 414. 1891.

PHILIPS, J. Reduced to its actual essence, the ultimate position of defendant is this: That although the language employed in the given article may be obscene, as heretofore defined, yet as it was a necessary vehicle to convey to the popular mind the aggravation of the abuses in sexual commerce inveighed against, and the object of the publisher being to correct the evil and thereby alleviate human condition, the author should be deemed a public benefactor, rather than a malefactor. In short, the proposition is that a man can do no public wrong who believes that what he does is for the ultimate public good. The underlying vice of all this character of argument is that it leaves out of view the existence of the social compact, and the idea of government by law. If the end sought justifies the means, and there were no arbiter but the individual conscience of the actor to determine the fact whether the means are justifiable, homicide, infanticide, pillage, and incontinence might run riot; and it is not extravagant to predict that the success of such philosophy would remit us to that barbaric condition where

> "No common weal the human tribe allied,
> Bound by no law, by no fixed morals tied,
> Each snatched the booty which his fortune brought,
> And wise in instinct each his welfare sought."

Guiteau stoutly maintained to the end his sanity, and that he felt he had a patriotic mission to fulfill in taking off President Garfield, to the salvation of a political party. The Hindu mother cast her babe to the advouring Ganges to appease the gods. But civilized society says both are murderers. The Mormon contends that his religion teaches polygamy; and there is a school of so-called "modern thinkers" who would abolish monogamy, and erect on the ruins the flagrant doctrine of promiscuity, under the disguise of the affinities. All these claim liberty of conscience and thought as the basis of their dogmas, and the pro bono publico as the strength of their claim to indulgence. The law against adultery itself would lie dormant if the libertine could get the courts to declare and the jury in obedience thereto to say that if he invaded the sanctuary of conjugal life under the belief that the improvement of the human race demanded it he was not amenable to the statute. Society is organized on the theory, born of the necessities of human well-being, that each member yields up something of his natural privileges, predilections, and indulgences for the good of the composite community; and he consents to all the motto implies, salus populi suprema est lex; and, as no government can exist without law, the law-making power, within the limits of constitutional authority, must be recognized as the body to prescribe what is right and prohibit what is wrong. It is the very incarnation of the spirit of anarchy for a citizen to proclaim that like the heathen he is a law unto himself. The responsibility for this statute rests upon Congress. The duty of the courts is imperative to enforce it while it stands.

CHAPTER IV.

INTENT AS AFFECTED BY CONDITIONS.

Ignorance or Mistake of Fact.

GORDON v. STATE.

52 Ala. 308. 1875.

BRICKELL, C. J. This indictment is founded on the fortieth section of the statute, approved April 22, 1873, entitled "An act to regulate elections in the State of Alabama," which declares: "That any person voting more than once at any election held in this State, or depositing more than one ballot for the same office at such election, or is guilty of any other kind of illegal or fraudulent voting, shall be deemed guilty of a felony," etc. Pamph. Acts 1872-3, p. 25. The first count charges that the appellant, not being of the age of twenty-one years, voted at the last general election in this State. * * * Two witnesses were examined on the behalf of defendant; one, his mother, and the other an acquaintance who had known him from his birth, and resided in the same neighborhood, and for a long time a member of the same family with defendant, and they testified the defendant was of the age of twenty-one years, in the August preceding the election. That they had frequently told defendant he would be of full age in that month, and subsequently and before the election told him he was of age. The court refused to charge the jury that if the defendant, in reliance on these statements, honestly believed he was of full age when he voted, he should not be convicted, if the evidence convinced the jury he was not of age.

"All crime exists, primarily, in the mind." A wrongful act and a wrongful intent must concur, to constitute what the law deems a crime. When an act denounced by the law is proved to have been committed, in the absence of countervailing evidence,

the criminal intent is inferred from the commission of the act. The inference may be, and often is, removed by the attending circumstances, showing the absence of a criminal intent. Ignorance of law is never an excuse, whether a party is charged civilly or criminally.

Ignorance of fact may often be received to absolve a party from civil or criminal responsibility. On the presumption that every one capable of acting for himself knows the law, courts are compelled to proceed. If it should be abandoned, the administration of justice would be impossible, as every cause would be embarrassed with the collateral inquiry of the extent of legal knowledge of the parties seeking to enforce or avoid liability and responsibility.

The criminal intention being of the essence of crime, if the intent is dependent on a knowledge of particular facts, a want of such knowledge, not the result of carelessness or negligence, relieves the act of criminality. An illustration may be found in the vending of obscene or immoral publications. A knowledge of the character of such publications is an indispensable ingredient of the offense. From the vending it would be inferable; but if it appeared the vendor was blind, and in the course of his trade happened innocently to make the sale, a want of knowledge of the character of the publication would relieve him from criminal responsibility. A man having in his possession counterfeit coin, or forged bank bills, with intent to put them in circulation, could not be convicted of crime, if he was ignorant of their spuriousness. A statute imposed a penalty on the owner or captain of any steamboat receiving and transporting any colored person, without having particular evidence that such person was free. The penalty could be inflicted only on the captain or owner who knowingly transported such person. If the person of color, without the knowledge or consent of the captain or owner, entered the boat, concealing himself, and was thus carried away, the penalty was not incurred. Duncan v. State, 7 Humph. 148.

Illegal voting, when it is supposed to arise from the want of legal qualifications, is dependent on the voter's knowledge of the particular facts which make up the qualification. Every man is bound to know the law requires that every voter shall be a native born or naturalized citizen of the United States, of the age of

twenty-one years, and have resided in the State six months, and the county in which he offers to vote, three months next preceding the election, and must not have been convicted of the offenses mentioned in the Constitution as the disqualification of an elector. He is bound to exercise reasonable diligence to ascertain the facts which enter into and form these qualifications. Having exercised this diligence, if he resided near the boundary line of a county, and should be informed by those having the means of knowledge that his residence was within the county, and he, without a knowledge of the real facts, honestly acting on this information, should vote, he could not fairly be charged with illegal voting, though on a subsequent survey, or on some other evidence, it should be ascertained his residence was not within the county.

The precise time when a man arrives at the age of twenty-one years is a fact, knowledge of which he derives necessarily from his parents, or other relatives or acquaintances having knowledge of the time of his birth. If acting in good faith, on information fairly obtained from them under an honest belief that he had reached the age, he votes, having the other necessary qualifications, illegal voting should not be imputed to him. The intent which makes up the crime cannot be affirmed. Whether he had the belief that he was a qualified voter, and the information was fairly obtained, should be referred to, and determined by the jury. The whole inquiry should be directed to the voter's knowledge of facts, and to his diligence in acquiring the requisite knowledge. If he votes recklessly or carelessly, when the facts are doubtful or uncertain, his ignorance should not excuse him, if the real facts show he was not qualified. If ignorant of the disqualifying fact, and without a want of diligence, under an honest belief of his right to vote, he should be excused, though he had not the right. 2 Bish. Cr. Law, §§ 276-279; State v. Boyett, 10 Ired. 336; McGuire v. State, 7 Humph. 54; Commonwealth v. Bradford, 9 Met. 268; Commonwealth v. Aglar, Thatcher's Cr. Cases, 412.

The charge given by the circuit court, and several of the refusals to charge, were according to these views erroneous, and the judgment must be reversed, and the cause remanded. The appellant must remain in custody until discharged by due course of law.

Infancy.

ANGELO v. PEOPLE.

96 Ill. 209. 1880.

Mr. Justice WALKER delivered the opinion of the Court:

At the August term, 1878, of the Morgan circuit court, the grand jury presented an indictment against John Angelo, then about seventy-eight years of age, and his son, Theodore Angelo, about eleven years of age, for the murder of Isaac Hammill. A trial was had at the following November term of the court, resulting in the acquittal of John, on the ground of insanity, and the conviction of Theodore of manslaughter, and the jury fixed the term of his imprisonment in the penitentiary at six years. A motion for a new trial by Theodore was entered, but overruled by the court, and he was sentenced to the Reform School for four years; and he prosecutes error, and brings the record to this court, and urges a reversal, on several grounds.

The statute has provided, by section 282 of the Criminal Code, that a person shall be considered of sound mind who is neither an idiot nor lunatic, nor affected with insanity, and who has arrived at the age of fourteen, or before that age if such person knows the distinction between good and evil. The 283d section provides that an infant under ten years of age shall not be found guilty of any crime or misdemeanor. * * *

"Between the ages of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax;* but in this case the maxim applies, *malitia supplet ætatem*—malice (which is here used in its legal sense, and means the doing of a wrongful act intentionally, without just cause or excuse) supplies the want of mature years. Accordingly, at the age above mentioned, the ordinary legal presumption may be rebutted by strong and pregnant evidence of mischievous discretion; for the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. In all such cases, however, the evidence of malice ought to be strong, and clear beyond all doubt and contradiction." See Archbold's Crim. Plead. pp. 11 and 12, where

the same rule is announced. Nor are we aware of any opposing authority.

There is uncontradicted evidence in the record that plaintiff in error was little more than eleven years of age when the homicide was committed. This evidence was not contradicted, but was virtually conceded by the eighth instruction asked and given for the People. If this was true, and the evidence tended to prove it, the rule required evidence strong and clear beyond all doubt and contradiction, that he was capable of discerning between good and evil; and the legal presumption being that he was incapable of committing the crime, for want of such knowledge, it devolved on the People to make the strong and clear proof of capacity, before they could be entitled to a conviction. This record may be searched in vain to find any such proof. There was no witness examined on that question, nor did any one refer to it. There is simply evidence as to his age. For aught that appears, he may have been dull, weak, and wholly incapable of knowing good from evil. It does not appear, from even the circumstances in evidence, that he may not have been mentally weak for his age, or that he may not have even approached idiocy.

The law presumes that he lacked mental capacity at his age, and that presumption has not been overcome by the requisite proof, or, in fact, any proof. The court below should, therefore, have granted a new trial, and erred in refusing it. * * *

Judgment reversed.

Insanity.

GUITEAU'S CASE.

10 Fed. 161. 1882.

The following charge (omitting a part not involving the question of insanity) was delivered by Judge Cox in the district court of the District of Columbia, January 25, 1882, on the trial of Charles J. Guiteau for the murder of President Garfield, on July 2, 1881. The jury returned a verdict of guilty:

We now approach the difficult question in this case.

I have said that a man who is insane, in a sense that makes him irresponsible, cannot commit a crime.

The defense of insanity has been so abused as to be brought

into great discredit. It has been the last resort in cases of unquestionable guilt, and has been the excuse to juries for acquittal, when their own and the public sympathy have been with the accused, and especially when the provocation to homicide has excused it according to public sentiment, but not according to law. For these reasons, it is viewed with suspicion and disfavor, whenever public sentiment is hostile to the accused. Nevertheless, if insanity be established to the degree that has been already, in part, and will hereafter further be explained, it is a perfect defense to an indictment for murder, and must be allowed full weight.

Now, it is first to be observed that we are not troubled in this case with any question about what may be called total insanity, such as raving mania, or absolute imbecility, in which all exercise of reason is wanting, and there is no recognition of persons or things, or their relations.

But there is a debatable border-line between the sane and the insane, and there is often great difficulty in determining on which side of it a party is to be placed. There are cases in which a man's mental faculties generally seem to be in full vigor, but on some one subject he seems to be deranged. He is possessed, perhaps, with a belief which every one recognizes as absurd, which he has not reasoned himself into, and cannot be reasoned out of, which we call an insane delusion, or he has, in addition, some morbid propensity, seemingly in harsh discord with the rest of his intellectual and moral nature.

These are cases of what, for want of a better term, is called partial insanity.

Sometimes its existence, and at other times its limits, are doubtful and undefinable. And it is in these cases that the difficulty arises of determining whether the patient has passed the line of moral or legal accountability for his actions.

You must bear in mind that a man does not become irresponsible by the mere fact of being partially insane. Such a man does not take leave of his passions by becoming insane, and may retain as much control over them as in health. He may commit offenses, too, with which his infirmity has nothing to do. He may be sane as to his crime, understand its nature, and be governed by the same motives in regard to it as other people; while on some other subject, having no relation to it whatever,

he may be subject to some delusion. In a reported case, a defendant was convicted of cheating by false pretenses, but was not saved from punishment by his insane delusion that he was the lawful son of a well known prince. The first thing, therefore, to be impressed upon you is, that wherever this partial insanity is relied on as a defense, it must appear that the crime charged was the product of the delusion, or other morbid condition, and connected with it as effect with cause, and not the result of sane reasoning or natural motives, which the party may be capable of, notwithstanding his circumscribed disorder. The importance of this will be appreciated by you further on.

But, assuming that the infirmity of mind has had a direct influence in the production of crime, the difficulty is to fix the degree and character of the disorder which, in such case, will create irresponsibility in law. * * *

The instructions that have been given you import, in substance, that the true test of criminal responsibility, where the defense of insanity is interposed, is whether the accused had sufficient use of his reason to understand the nature of the act with which he is charged, and to understand that it was wrong for him to commit it; that if this was the fact he is criminally responsible for it, whatever peculiarities may be shown about him in other respects; whereas, if his reason was so defective, in consequence of mental disorder, generally supposed to be caused by brain disease, that he could not understand what he was doing, or that what he was doing was wrong, he ought to be treated as an irresponsible person.

Now, as the law assumes every one at the outset to be sane and responsible, the question is, what is there in this case to show the contrary as to this defendant?

A jury is not warranted in inferring that a man is insane from the mere fact of his committing a crime, or from the enormity of the crime, or from the mere apparent absence of adequate motive for it, for the law assumes that there is a bad motive—that it is prompted by malice—if nothing else appears. * * *

Was his ordinary, permanent, chronic condition of mind such, in consequence of disease, that he was unable to understand the nature of his actions, or to distiguish between right and wrong in his conduct? Was he subject to insane delusions that destroyed his power of so distinguishing? And did this continue

down to and embrace the act for which he is tried? If so, he was simply an irresponsible lunatic.

Or, on the other hand, had he the ordinary intelligence of sane people, so that he could distinguish between right and wrong, as to his own actions? If another person had committed the assassination, would he have appreciated the wickedness of it? If he had had no special access of insanity impelling him to it, as he claims was the case, would he have understood the character of such an act and its wrongfulness if another person had suggested it to him? If you can answer these questions in your own minds it may aid you towards a conclusion as to the normal or ordinary condition of the prisoner's mind before he thought of this act; and if you are satisfied that his chronic or permanent condition was that of sanity, at least so far that he knew the character of his own actions, and whether they were right or wrong, and was not under any permanent insane delusions which destroyed his power of discriminating between right and wrong as to them, then the only inquiry remaining is whether there was any special insanity connected with this crime; and what I shall further say will be on the assumption that you find his general condition to have been that of sanity to the extent I have mentioned.

On this assumption it will be seen that the reliance of the defense is on the existence of an insane delusion in the prisoner's mind which so perverted his reason as to incapacitate him from perceiving the difference between right and wrong as to this particular act.

As a part of the history of judicial sentiment on this subject, and by way of illustrating the relation between insane delusions and responsibility, I will refer to a celebrated case in English history already freely commented on in argument. Nearly 40 years ago one MacNaghten was tried in England for killing a Mr. Drummond, private secretary of Sir Robert Peel, mistaking him for the premier himself. He was acquitted on the ground of insanity, and his acquittal caused so much excitement that the house of lords addressed certain questions to the judges of the superior courts of England in regard to the law of insanity in certain cases, and their answers have been since regarded as settling the law on this subject in England, and, with some qualification, have been approved in the courts of this country. One of the questions was: "If a person, under an insane delu-

sion as to the existing facts, commits an offense in consequence thereof, is he thereby excused?" To which it was answered, that: "In case he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts with regard to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

This, you will understand, was because it was excusable to kill in self-defense, but not to kill in revenge for an injury.

This has been in part recognized as law in this country. * * *

Let me illustrate further:

A man talks to you so strongly about his intercourse with departed spirits that you suspect insanity. You find, however, that he has witnessed singular manifestations, that his senses have been addressed by sights and sounds, which he has investigated, reflected on, and been unable to account for, except as supernatural. You see, at once, that there is no insanity here; that his reason has drawn a conclusion from evidence.

The same man, on further investigation of the phenomena that staggered him, discovers that it is all an imposture and surrenders his belief.

Another man, whom you know to be an affectionate father, insists that the Almighty has appeared to him and commanded him to sacrifice his child. No reasoning has convinced him of his duty to do it, but the command is as real to him as my voice is now to you. No reasoning or remonstrance can shake his conviction or deter him from his purpose. This is an insane delusion, the coinage of a diseased brain, as seems to be generally supposed, which defies reason and ridicule, which palsies the reason, blindfolds the conscience, and throws into disorder all the springs of human action. * * *

You are to determine whether, at the time when the homicide was committed, the defendant was laboring under any insane delusion prompting and impelling him to the deed.

Very naturally you look, first, for any explanation of the act which may have been made by the defendant himself at the time or immediately before and after.

When men reason the law requires them to reason correctly, as far as their practical duties are concerned. When they have the capacity to distinguish between right and wrong, they are bound to do it. Opinions, properly so called,—i. e., beliefs resulting from reasoning, reflection, or examination of evidence —afford no protection against the penal consequences of crime. A man may believe a course of action to be right, and the law, which forbids it, to be wrong. Nevertheless, he must obey the law, notwithstanding his convictions. And nothing can save him from the consequences of its violation, except the fact that he is so crazed by disease as to be unable to comprehend the necessity of obedience to it.

* * * * * * * * * *

Between one and two centuries ago there arose a school of moralists who were accused of maintaining the doctrine that whenever an end to be attained is right, any means necessary to attain it would be justifiable. They were accused of practicing such a process of reasoning as would justify every sin in the decalogue when occasion required it. They incurred the odium of nearly all Christendom in consequence. But the mode of reasoning attributed to them would seem to be impliedly, if not expressly, reproduced in the papers written by the defendant and shown in evidence:

"It would be a right and patriotic thing to unite the Republican party and save the republic. Whatever means may be necessary for that object would be justifiable. The death of the president by violence is the only and therefore the necessary means of accomplishing it, and therefore it is justifiable. Being justifiable as a political necessity, it is not murder."

Such seems to be the substance of the ideas which he puts forth to the world as his justification in these papers. If this is the whole of his position, it presents one of those vagaries of opinion for which the law has no toleration, and which furnishes no excuse whatever for crime.

This, however, is not all that the defendant now claims.

There is, undoubtedly, a form of insane delusion, consisting of a belief by a person that he is inspired by the Almighty to do

something—to kill another, for example—and this delusion may be so strong as to impel him to the commission of a crime.

The defendant, in this case, claims that he labored under such a delusion and impulse, or pressure, as he calls it, at the time of the assassination. * * *

The theory of the government is that the defendant committed the homicide in the full possession of his faculties, and from perfectly sane motives; that he did the act from revenge, or perhaps from a morbid desire for notoriety; that he calculated deliberately upon being protected by those who were politically benefited by the death of the president, and upon some ulterior benefit to himself; that he made no pretense to inspiration at the time of the assassination, nor until he discovered that his expectations of help from the so-called stalwart wing of the Republican party were delusive, and that these men were denouncing his deed, and that then, for the first time, when he saw the necessity of making out some defense, he broached this theory of inspiration and irresistible pressure, forcing him to the commission of the act.

If this be true you would have nothing to indicate the real motives of the act except what I have already considered. Whether it is true or not, you must determine from all the evidence. * * *

In all this matter there is one important distinction that you must not lose sight of, and you are to decide how far it is applicable to this case. It is the distinction between mental and moral obliquity; between a mental incapacity to understand the distinctions between right and wrong, and a moral indifference and insensibility to those distinctions. The latter results from a blunted conscience, a torpid moral sense or depravity of heart; and sometimes we are not inapt to mistake it for evidence of something wrong in the mental constitution. We have probably all known men of more than the average of mental endowments, whose whole lives have been marked by a kind of moral obliquity and apparent absence of the moral sense. We have known others who have first yielded to temptation with pangs of remorse, but each transgression became easier, until dishonesty became a confirmed habit, and at length all sensitiveness of conscience disappeared. * * *

And now, to sum up all that I have said, in a few words:

If you find from the whole evidence that, at the time of the

commission of the homicide, the prisoner, in consequence of disease of mind, was laboring under such a defect of his reason that he was incapable of understanding what he was doing, or that it was wrong,—as, for example, if he was under an insane delusion that the Almighty had commanded him to do the act, and in consequence of that he was incapable of seeing that it was a wrong thing to do,—then he was not in a responsible condition of mind, and was an object of compassion, and not of justice, and ought to be now acquitted.

On the other hand, if you find that he was under no insane delusion, such as I have described, but had possession of his faculties and the power to know that his act was wrong, and of his own free will deliberately conceived, planned, and executed this homicide, then, whether his motive was personal vindictiveness or political animosity, or a desire to avenge a supposed political wrong, or a morbid desire for notoriety, or fanciful ideas of patriotism or of the Divine will, or you are unable to discover any motive at all, the act is simply murder, and it is your duty to find him guilty.

Intoxication.

PIGMAN v. STATE.

14 Ohio 555. 1846.

This is a writ of error to the court of common pleas of Marion county.

The plaintiff in error was indicted for uttering, publishing, bartering and disposing of counterfeit bank bills. The proof was the passing of a counterfeit bank bill of twenty dollars. A verdict of guilty was found by the jury, and the plaintiff was sentenced to four years' imprisonment in the penitentiary.

A number of errors are assigned. But the one chiefly relied upon, or at all available, as disclosed in the bill of exceptions, is, that the court ruled out evidence offered by the accused, to show that he was drunk at the time he passed the bill, and therefore did not know what he was doing, or that the bill was counterfeit.

No argument was submitted for the plaintiff.

READ, J. Drunkenness is no excuse for crime; yet, in that class of crimes and offenses which depend upon guilty knowl-

edge, or the coolness and deliberation with which they shall have been perpetrated, to constitute their commission, or fix the degree of guilt, it should be submitted to the consideration of the jury. If this act is of that nature that the law requires it should be done with guilty knowledge, or the degree of guilt depends upon the calm and deliberate state of the mind at the time of the commission of the act, it is proper to show any state or condition of the person that is adverse to the proper exercise of the mind, and the undisturbed possession of the faculties. The older writers regarded drunkenness as an aggravation of the offense, and excluded it for any purpose. It is a high crime against one's self, and offensive to society and good morals; yet every man knows that acts may be committed in a fit of intoxication which would be abhorred in sober moments. And it seems strange that any one should ever have imagined that a person who committed an act from the effect of drink, which he would not have done if sober, is worse than the man who commits it from sober and deliberate intent. The law regards an act done in sudden heat, in a moment of frenzy, when passion has dethroned reason, as less criminal than the same act when performed in the cool and undisturbed possession of all the faculties. There is nothing the law so much abhors as the cool, deliberate, and settled purpose to do mischief. That is the quality of a demon; whilst that which is done on great excitement, as when the mind is broken up by poison or intoxication, although, to be punished, may, to some extent, be softened and set down to the infirmities of human nature. Hence—not regarding it as an aggravation—drunkenness, as anything else showing the state of mind or degree of knowledge, should go to the jury. Upon this principle, in modern cases, it has been permitted to be shown that the accused was drunk when he perpetrated the crime of killing, to rebut the idea that it was done in a cool and deliberate state of the mind, necessary to constitute murder in the first degree. The principle is undoubtedly right. So, on a charge of passing counterfeit money; if the person was so drunk that he actually did not know that he had passed a bill that was counterfeit, he is not guilty. It oftentimes requires much skill to detect a counterfeit. The crime of passing counterfeit money, consists of knowingly passing it. To rebut that knowledge, or to enable the jury to judge rightly of the matter, it is competent for the

person charged to show that he was drunk at the time he passed the bill. It is a circumstance, among others, entitled to its just weight.

Judgment reversed, and cause remanded.

Incorporation.

COMMONWEALTH v. PULASKI COUNTY AGRICULTURAL AND MECHANICAL ASSOCIATION.

92 Ky. 197, 17 S. W. 442. 1891.

Appeal from circuit court, Pulaski county.

Indictment of the Pulaski County Agricultural and Mechanical Association for permitting gaming on its fair-grounds. A demurrer to the indictment was sustained, and the state appeals. Reversed.

HOLT, C. J. The appellee, the Pulaski County Agricultural and Mechanical Association, a corporation, was indicted for permitting gaming upon its fair-grounds. A demurrer was sustained to the indictment, and it was dismissed. It is contended that a corporation cannot commit this offense. It was in the early history of the law held that, as a corporation was soulless, it could do no wrongful or immoral act, and could not, therefore, be liable in tort. This doctrine has long since become obsolete, and it has long been well settled that a corporation is liable civiliter for all torts committed by its authority, express or implied. With the growth of corporations came the necessity for this rule, and its adaptability to changed circumstances is an excellence of the common law. So far does the rule extend that a corporation is liable civilly for every intended or negligent wrong it may do, although the act may be ultra vires. If it be incidental to or connected with its business, or if it ratify the transaction, as by accepting the benefit, it must respond in damages, although the act be done, as it must, by an agent. In time, it came to be admitted that a corporation was liable to be indicted for a neglect of duty, or a mere nonfeasance; but it was claimed that its nature did not admit of its doing positive wrong, and that, therefore, it was not liable criminally for a misfeasance, whereby a wrong was done by a violation of its

duty. This same reason, however, if sound, applied equally to civil as well as criminal injuries; and it soon became known from experience that, as has been said, if a corporation had no hands with which to strike, it may employ the hands of others. This distinction was therefore properly disregarded as unsound. If the argument be sound that a corporation is not liable to indictment for any offense, because the criminal act was not warranted by its corporate powers, then the same reasoning would result in its nonliability for all wrongs, civil as well as criminal. Such a rule would lead to its absolute impunity for all wrongs, which the experience of this day shows would produce great injustice both to individuals and the public. If it be said that the individuals who might do the act would be liable, it may be said that this is true as to every servant or agent who does a wrong, but because this is so the principal is not exempt. Indeed, it has been and should be rather the policy of the law, because that is likely to the better protect from the commission of wrong, to look rather to the principal than the agent, and it seems to us especially should this be so in the case of corporations for whose benefit the act is done, or, being connected with its business, is negligently omitted to be done; its directors in charge or its workmen being perhaps unknown and irresponsible. The object should be to reach and punish the real power in the matter, and thus prevent a repetition of the offense. Experience showed the necessity of modifying the old rules; and the decided tendency of modern decision has been to extend the application of all legal remedies, both civil and criminal, to corporations, and subject them thereto as in the case of individuals, so far as is possible. It is therefore now well settled in the courts of this country, as well as in England, that they are indictable for misfeasance as well as in non-feasance of duty unlawful in itself, and injurious to the public. It has therefore been held that they may be indicted for a nuisance, whether arising from misfeasance or non-feasance, or for an injury otherwise to the public, unlawful in itself, and arising either from commission, or the omission to perform a legal duty. They may be indicted for erecting and continuing a building; for leaving railroad cars in a street; for neglecting to repair a highway; for permitting stagnant water to remain on their premises; for libel; for "Sabbath-breaking" by doing work on Sunday in violation of a

statute; and in many other instances. It is true there are crimes of which from their very nature, as perjury, for example, they cannot be guilty. There are crimes to the punishment for which, for a like reason, they cannot be subjected, as in the case of a felony. But wherever the offense consists in either a misfeasance or a non-feasance of duty to the public, and the corporation can be reached for punishment as by a fine and the seizure of its property, precedent authorizes, and public policy requires, that it should be liable to indictment. Any other rule would in many cases preclude adequate remedy, and leave irresponsible servants to answer for the offense, rather than those who are really most at fault. Com. v. Proprietors, 2 Gray, 339; State v. Railroad Co., 23 N. J. Law, 360; Railroad Co. v. State, 3 Head, 523; Bank v. Graham, 100 U. S. 699. If it be said that such a rule may subject the property of innocent stockholders, for the acts of the directors to which they are not actual parties, and of which they have no knowledge, the answer is that they select the directors, and it is their business to have those who will see that the corporate business is so conducted as not to injure others or infringe upon public right and good order in the community. If the penalty prescribed for the act be both fine and imprisonment, then, so far as the punishment cannot, from the nature of the offender, be carried out, the statute is, of course, inoperative. The act of March 25, 1886, is not in conflict with, and did not, therefore, repeal, sections 7 and 10 of chapter 47 of the General Statutes. The judgment is reversed, and the case remanded for further proceedings consistent with this opinion.

CHAPTER V.

JUSTIFICATION.

Furtherance of Public Justice as a Justification.

RENEAU v. STATE.

2 Lea 720 (Tenn.). 1879.

From Jefferson.

Appeal in error from circuit court, Jefferson county; J. G. Rose, Judge.

McFARLAND, J. The prisoner appeals from a conviction of manslaughter for the killing of Vineyard Thomas. The facts are that Thomas, the deceased, was arrested by the prisoner, who was a constable, under a warrant charging an assault and battery. Before the justice of the peace, Thomas pleaded guilty, and was adjudged to pay a fine and costs, and in default of security was committed to jail, and in the execution of a mittimus issued by the justice for that purpose, the prisoner started with Thomas to the county jail, accompanied by another person as guard. On the route Thomas started to run and make his escape. Neither the prisoner nor his guard pursued, but after commanding Thomas three times to halt, and not being obeyed, the prisoner fired two shots at Thomas, one of which took effect, killing him almost instantly. The prisoner is shown to be a man of good character, and he expressed regret at the result, saying that he did not intend to kill the deceased. The latter was of bad character for violence, and had threatened that he would not submit to arrest. The law on this subject, as laid down by Mr. Bishop, is, in substance, that an officer having a prisoner in custody for felony, who attempts escape, will be excused for killing him if he cannot be otherwise retaken, but if he can be otherwise retaken in any case without resort to such harsh measures, it will be at least manslaughter to kill him. But in cases where the person slain is arrested or held in custody for

a misdemeanor, and he fly or attempt to escape, it will be murder in the officer to kill him, although he cannot be otherwise overtaken; yet, under some circumstances, it may be only manslaughter, as if it appear that death was not intended. 2 Bish. Cr. Law, §§ 648, 649. It is considered better to allow one guilty only of a misdemeanor to escape altogether than to take his life. And we may add that it may be a question worthy of consideration whether the law ought not to be modified in respect to the lower grade of felonies, especially in view of the large number of crimes of this character created by comparatively recent legislation, whether as to these even escape would not be better than to take life. The charge of the judge in this case was in accord with the law as above stated, and the jury have given the prisoner the benefit of all doubts, and convicted him of the lower grade of homicide. It is argued that the offense for which the deceased was arrested was in reality a felonious assault, and the prisoner had the right to hold him in custody for this grade of offense, but it clearly appears that the warrant under which he was arrested charged only an assault and battery, and the judgment and mittimus of the justice only committed him in default of security for fine and costs for a misdemeanor. We see nothing to change the principle in the fact that the deceased had been adjudged to pay the fine and costs by the justice of the peace. As to the duties of the officer, his duties were the same whether he held the prisoner in custody after or before the judgment of the justice. The prisoner, doubtless, acted under the belief that erroneously prevails as to the rights of a public officer, that is, that he may lawfully kill a prisoner if he fails to obey his command to halt. This is a very erroneous and very fatal doctrine, and must be corrected. Officers should understand that it is their duty to use such means to secure their prisoners as will enable them to hold them in custody without resorting to the use of firearms or dangerous weapons, and that they will not be excused for taking life in any case where, with diligence and caution, the prisoner could be otherwise held.

While the prisoner in this case seems to have honestly entertained the opinion that his duty required him to do what he did, and to have acted entirely without malice, and while he is entitled to strong sympathy, still we are constrained to affirm the judgment.

Self-Defense.

ERWIN v. STATE.

29 Ohio St. 186. 1876.

Error to court of common pleas of Gallia county.

McILVAINE, J. * * * It is also claimed that the court below erred in charging the jury as to the law of self-defense.

The case shows that the defendant and the deceased, his son-in-law, resided upon lands belonging to the defendant, in different houses, situated a short distance apart. Between their houses, but not within the curtilage of either, there was a corn crib and shed suitable for the storage of grain and farming implements. This building was situate in a field cultivated by the deceased as a cropper, and had been used by him for the storage of grain, and also by the defendant for the storage of his farming tools. A controversy arose between the parties as to the right of possession of the building. Shortly before the homicide, the defendant's tools had been thrown out of this shed, and were replaced and secured by chains and locks. These chains were afterwards broken. On the day of the homicide, the defendant was in the shed securing his tools, and the deceased was near his own house, and close by, when angry words passed between them; whereupon the deceased, with an ax on his shoulder, approached the shed in a threatening manner, and when near it, the defendant warned him not to enter. Without heeding this warning, the deceased advanced to the eave of the shed, perhaps within striking distance of the defendant, when the latter shot him with a pistol, inflicting a wound from which death soon followed. Testimony was offered on the trial, more or less conflicting as to previous bitter feelings between the parties; also as to the threatening attitude of the deceased at time of the shooting, and as to the defendant's facilities for retreat from the place occupied by him at the time.

The portion of the charge complained of was as follows: "If you find, from the greater weight of the evidence, that the defendant was, at the time the fatal shot was fired, in the lawful pursuit of his business, and he was attacked by the deceased under circumstances which denote an intention to take away his

life, or to do him some great bodily harm, he may lawfully kill his assailant; provided he use all means in his power otherwise to save his own life or to prevent the intended harm; such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. But if the attack upon him is so sudden, fierce, and violent, that a retreat would not diminish, but increase, his danger, he may kill his adversary without retreating; and further, if you find, from the evidence, that from the character of the attack there was reasonable ground for the defendant to believe, and from the evidence you find the defendant did honestly believe, that his life was about to be taken, or he was to suffer great bodily harm, and that he believed honestly that he would be in equal danger by retreating, then, if he took the life of the assailant, he would be excused."

The contention, on the part of the plaintiff in error, is that the court below erred in the application of the doctrine of "retreating to the wall." The question here presented has not been decided in any of our reported cases, although it has been often raised and variously determined in our *nisi prius* courts. It may be said, indeed, that learned courts and able text writers have left the question in some obscurity. The true solution must undoubtedly be determined upon the principles of the common law; and such is the present state of the authorities, that it seems necessary to examine the books of the law written at a period before the apparent or real confusion had an existence. * * *

It is true that all authorities agree that the taking the life in defense of one's person cannot be either justified or excused, except on the ground of necessity; and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question, then, is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from

an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.

Now, under the charge below, notwithstanding the defendant may have been without fault, and so assaulted, with the necessity of taking life to save his own upon him, still the jury could not have acquitted, if they found he had failed to do all in his power otherwise to save his own life, or prevent the intended harm, and retreated as far as he could, etc. In this, we think, the law was not correctely stated. * * *

Judgment reversed and cause remanded for further proceedings.

CAMPBELL v. PEOPLE.

16 Ill. 17. 1854.

This cause was tried before Parrish, Judge, at June term, 1854, of Massac circuit court.

CATON, J. The plaintiff in error, who is a negro, was indicted for the murder of Goodwin Parker. The evidence in the case tends very strongly to show that the deceased made an assault upon the prisoner, and that the homicide was committed in necessary self-defense. It appears that the deceased and three others went to seek the prisoner at his father's house, in the night time. The deceased went to the door of the house, leaving his companions thirty or forty yards back, to whom he was to give warning if Campbell was in the house. Shortly after the deceased went to the door, he called to the others to come on, and informed them that the negro was there. They rushed up, when the deceased and the prisoner were seen some distance from the house, engaged together, and there the deceased was stabbed, and died in a few minutes. When the deceased went to the house, he had a hatchet in his hands, which was found near the spot where he was killed; and, after the negro was committed to jail, a wound was observed upon his head which penetrated to the skull, and which appeared to have been made with a hatchet, an axe, or a hammer. There was no pretense that there was any sort of justification or legal cause for arresting or assaulting the prisoner. Upon the trial the defense offered to prove that on that day, and at other times shortly

before his death, the deceased had made threats against the prisoner. This evidence the court ruled out, and an exception was taken. In this the court unquestionably erred, although they may never have come to the knowledge of the defendant till after the homicide was committed. If the deceased had made threats against the defendant, it would be a reasonable inference that he sought him for the purpose of executing those threats, and thus they would serve to characterize his conduct towards the prisoner at the time of their meeting and of the affray. If he had threatened to kill, maim, or dangerously beat the defendant, it would be a fair inference, especially so long as the evidence shows that he had a hatchet in his hands, that he had attempted to accomplish his declared purpose; and, if so, then the prisoner was justified in defending himself, even to the taking of the life of his assailant, if necessary. While the threats, of themselves, could not have justified the prisoner in assailing and killing the deceased, they might have been of the utmost importance in connection with the other testimony, in making out a case of necessary self-defense. The evidence offered was proper, and should have been admitted.

The second instruction given for the prosecution, and which was excepted to, was as follows: "If the jury believe, from the evidence, that the defendant was pursued by the deceased, Goodwin Parker, and turned upon him, and slew him with a knife, or other instrument capable of producing a like death, when it was not necessary for self-preservation, or in necessary self-defense, or to prevent his receiving great bodily harm, although they believe there was no previous malice on the part of the defendant toward the deceased, yet they are bound to find the defendant guilty of manslaughter, and fix his term of confinement in the penitentiary of the state at not more than eight years." This instruction, if not absolutely wrong, was at least liable to misconstruction, and to be understood by the jury as depriving the defendant of the right of self-defense, unless his danger was not only apparently imminent, but was real and positive. If so understood, the instruction was wrong. If the defendant was pursued or assaulted by the deceased in such a way as to induce in him a reasonable and well-grounded belief that he was actually in danger of losing his life, or suffering great bodily harm, when acting under the influence of

such reasonable apprehension, he was justified in defending himself, whether the danger was real or only apparent. Actual and positive danger is not indispensable to justify self-defense. If one is assaulted with a sword in such a way as to indicate an intent to take his life, and with an apparent ability to accomplish such intent, he is not bound to stop and inquire whether the sword is but a lath, or whether the assault is but a jest, before he repels it with the necessary force to protect himself against the threatened harm. Or if one is assaulted with a pistol in such a way as to manifestly show a design to slay him, he may be justified in killing his assailant, although it should turn out the pistol was not loaded, and the only design was to frighten him. Men, when threatened with danger, are obliged to judge from appearance, and determine by the actual state of things, from the circumstances surrounding them, at least as much as if placed in other and less exciting positions; and it would be monstrous to say that, if they act from real and honest conviction, induced by reasonable evidence, they shall be held responsible criminally for a mistake in the extent of the actual danger, where other reasonable and judicious men would have been alike mistaken. A contrary rule would make the law of self-defense a snare and a delusion. It would become but a mockery of the sacred right of self-preservation.

CHAPTER VI.

PARTIES TO CRIME.

The Principal in the Second Degree.

DOAN v. STATE.

26 Ind. 495. 1866.

Appeal from circuit court, Johnson county.

RAY, J. The indictment in this case charged the appellant with unlawfully, and burglariously, etc., breaking and entering, in the night time, into the storehouse of Samuel P. Frost and John C. Valentine, partners doing business under the firm name of Frost & Valentine, with the felonious intent to steal, take, and carry away the personal goods, etc., of said Samuel P. Frost and John C. Valentine.

The proof on the trial was that, while two other persons broke and entered the storehouse, the appellant did not break or enter, but, acting in concert with the other two, remained outside, watching, and ready and near enough to render them assistance in case it might be required.

It is objected that the appellant was not charged as an aider and abettor, but as a principal. This was correct. At common law it was not required, in order to constitute one a principal in an offense, that the party charged should have been an eyewitness of the transaction, or within hearing. It was sufficient that he had knowledge of the crime, and watched near enough and ready to assist those actually engaged, if required. That made a presence aiding and abetting, and constituted him a principal in the second degree, and he could be charged and convicted as a principal. Indeed, it was ruled in the case of Rex v. Winifred, 1 Leach 515, that where a person was indicted as an accessory before the fact, he could not be convicted of that charge upon evidence proving him to have been present aiding and abetting; the distinction between a principal in the second degree and an

accessory before the fact being the presence of the former for the purpose of aiding, if required, those who actually commit the offense. That presence renders him who would otherwise have been but an accessory before the fact a principal in the second degree.

"The law, however," says Archbold, "recognizes no difference between the offense of the principal in the first degree, and of the principal in the second. Both are equally guilty, and so immaterial is the distinction considered in practice that, if a man be indicted as principal in the first degree, proof that he was present aiding and abetting another in committing the offense, although his was not the hand which actually did it, will support the indictment, and, on the other hand, if he be indicted as principal in the second degree, proof that he was not only present, but committed the offense with his own hand, will support the indictment. So where an offense is punishable by a statute which makes no mention of principal in the second degree, such principals are within the meaning of the statute as much as the parties who actually committed the offense." 1 Archb. Cr. Prac. & Pl. p. 13.

Our statute, indeed, goes beyond the common law, and authorizes, although it does not perhaps require, the indictment as a principal of one who simply counsels, aids, or abets in the commission of any offense, and who may, therefore, have been but an accessory before the fact, and not present at the time of its commission. 2 Gavin & H. St. § 66, p. 405. We think the instructions given by the court upon this point placed the case properly before the jury. * * *

Accessory Before the Fact.

BAKER v. STATE.

12 Ohio 214. 1861.

Error to the court of common pleas, Huron county.

SCOTT, C. J. The plaintiff in error was indicted, jointly with one Henrietta Beardsley, for an assault made by them upon one John E. Beardsley, with intent to commit a murder. * * *

The assignments of error arising from the refusal of the court

to discharge the defendant Baker at the close of the evidence offered on behalf of the state, and from the instructions given by the court to the jury, present the question whether one who incites or procures another to commit an assault and battery, at the commission of which he himself is not present, and does not otherwise participate therein, can, in this state, be properly indicted and convicted as a principal in the offense. At common law it is clear that he would be liable as a principal, for the doctrine of the common law is that in misdemeanors, and in all crimes under the degree of felony, there are no accessories, but all persons concerned therein, if guilty at all, are principals. 4 Bl. Comm. 36; Whart. Am. Cr. Law 118. So it is said: "One who incites others to commit an assault and battery is guilty, and may be punished as a principal, if the offense be actually committed, although he did not otherwise participate in it; as whatsoever will make a man an accessory before the fact in felony will make him a principal in treason, petit larceny, and misdemeanors." Id. 547. But it is claimed that this rule can have no application in this state, because we have no common-law crimes or offenses. But is this conclusion a logical sequence of the fact stated?

An assault is an offense, not only at common law, but also by our statute; while neither the common law nor the statute makes it a distinct, substantive offense to aid or abet another in the commission thereof. The statute does not define an assault, nor specify the acts or degree of participation which will render a party guilty thereof. These are matters which the statutes leave to be defined by the definitions, rules, and principles of the common law. So far as these rules remain unchanged by the statute, they are applicable and must govern. And while it is true that the statute makes it a substantive offense to aid or abet another in the commission of certain specified misdemeanors, yet this is not the case in regard to an assault and battery; nor in regard to a large majority of the statutory crimes and misdemeanors of the second class. In this large class of offenses it could not have been intended by the framers of the Criminal Code, that the guilty party who contrives, instigates, and procures their commission should go unpunished.

We are satisfied, therefore, that the law upon this branch of the case was correctly given in charge to the jury, and that the

court did not err in overruling the motion for the discharge of the defendant Baker. * * *

Accessory After the Fact.

WREN v. COMMONWEALTH.

26 Gratt. 952 (Va.). 1875

CHRISTIAN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the Hustings Court of the city of Richmond. * * *

The accused is charged with accessorial guilt. He is charged in the indictment with unlawfully receiving, harboring and maintaining John Dull, knowing him to have committed a felony. This charge constitutes what the law denominates "an accessory after the fact." The common law definitely and distinctly defines who is such an offender. He is a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon. 1 Hale P. C. 618; 1 Arch. Crim. Pract. 78, and cases there cited.

The reason on which the common law makes a party in such a case criminal, is that the course of public justice is hindered, and justice itself is evaded by facilitating the escape of the felon.

To constitute one an accessory after the fact, three things are requisite: 1. The felony must be completed; 2. He must know that the felon is guilty; 3. He must receive, relieve, comfort or assist him. It is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he has committed a felony. 2 Hawk. chap. 29, § 32. And although it seemed at one time to be doubted, whether an implied notice of the felony will not in some cases suffice, as where a man receive a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety, it seems to be the better opinion, that some more particular evidence is requisite to raise the presumption of knowledge. 1 Hale 323, 622; 3 P. Wms. R. 496; 4 Black. Com. 37.

But knowledge of the commission of the felony must be brought home to the accused, and whether he had such knowledge is always a question for the jury.

As to the receiving, relieving and assisting one known to be a

felon, it may be said in general terms, that any assistance given to one known to be a felon in order to hinder his apprehension, trial or punishment, is sufficient to make a man accessory after the fact; as that he concealed him in the house, or shut the door against his pursuers, until he should have an opportunity to escape; or took money from him to allow him to escape; or supplied him with money, a horse or other necessaries, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape; or conveyed instruments to him to enable him to break prison and escape. This and such like assistance to one known to be a felon, would constitute a man accessory after the fact. 1 Hale 619, 621; 2 Hawk. chap. 29, § 26. But merely suffering the principal to escape, will not make the party accessory after the fact; for it amounts at most but to a mere omission. 1 Hale 619; 9 H. iv., 1. Or if he agree for money not to prosecute the felon; or if knowing of a felony, fails to make it known to the proper authorities; none of these acts would be sufficient to make the party an accessory after the fact. If the thing done amounts to no more than the compounding a felony, or the misprision of it, the doer will not be an accessory. 1 Bishop. § 633; 1 Hale 371, 618. "The true test (says Bishop, § 634) whether one is accessory after the fact, is to consider whether what he did was done by way of personal help to his principal, with the view of enabling his principal to elude punishment; the kind of help rendered appearing to be unimportant."

Principal and Agent.

STATE v. BACON.

40 Vt. 456. 1868.

PECK, J. The next question is whether the respondent, on the facts stated, can be made liable criminally for the act of Rabidon, who was in his employ. It appears that the respondent, a dealer in coal, sent Rabidon to deliver coal to a customer, and Rabidon for convenience of unloading, to lessen the distance he would have to carry the coal, drove onto the sidewalk. The facts entirely exclude the idea of any fault on the part of the respondent, either intentional or otherwise. He was in no fault in entrusting an improper person to transact the business; for

it appears that Rabidon was about 21 years old, and had always been used to teaming. It expressly appears that the respondent had no knowledge that Rabidon intended to, or did, drive upon the sidewalk, and that it was done without the authority, knowledge or consent of the respondent. It is evident that the respondent had no reason to suppose that any such act would be done. If he is liable it must be from the legal relation of master and servant; and this, when the facts exculpate him from all fault and negligence. Under such circumstances there is no rule of law that can make the respondent responsible criminally for the act of his agent. * * *

CHAPTER VII.

INCOMPLETE OFFENSES.

Attempt—Physical Inability to Commit Crime Intended.

PEOPLE v. MORAN.

123 N. Y. 254. 1890.

Appeal from Supreme Court, general term, first department.

RUGER, C. J. The indictment in this case charged the defendant with an attempt to commit the crime of grand larceny in the second degree, by attempting to steal, take, and carry away from the person of an unknown woman, in the daytime, in the city and county of New York, certain goods, chattels, and personal property of a kind and description unknown, and of the alleged value of $10. It is claimed that the evidence did not show an attempt to commit a larceny. * * * The evidence given upon the trial showed that the defendant, accompanied by two associates, was observed passing around among the people gathered in a crowded market in New York, and was seen to thrust his hand into the pocket of a woman, and to withdraw it therefrom empty. Upon being approached by an officer, the defendant's companions escaped, but the defendant was arrested. The woman became lost in the crowd, and was not discovered. Upon this evidence, the defendant's counsel asked the court to direct a verdict for the defendant upon the ground that the facts proved did not support the charge in the indictment. The request was denied, and the defendant excepted. This exception presents the only question raised in the case, and depends, for its solution, upon the construction to be given to § 34 of the Penal Code. The claim of the defendant is that the evidence did not show that the woman had any property in her pocket which could be the subject of larceny, and that an attempt to commit that crime could not be predicated of a condition which rendered its commission impossible. We are of the opinion that the evidence was

sufficient to authorize the jury to find the accused guilty of the offense charged. It was plainly inferable from it that an intent to commit larceny from the person existed, and that the defendant did an act tending to effect its commission, although the effort failed. The language of the statute seems to us too plain to admit of doubt, and was intended to reach cases where an intent to commit a crime, and an effort to perpetrate it, although ineffectual, coexisted. Whenever the *animo furandi* exists, followed by acts apparently affording a prospect of success, and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. To constitute the crime charged, there must be a person from whom the property may be taken, an intent to take it against the will of the owner, and some act performed tending to accomplish it; and, when these things concur, the crime has, we think, been committed whether property could, in fact, have been stolen or not. In such cases the accused has done his utmost to effect the commission of the crime, but fails to accomplish it for some cause not previously apparent to him. The question whether an attempt to commit a crime has been made, is determinable solely by the condition of the actor's mind, and his conduct in the attempted consummation of his design. People v. Lawton, 56 Barb. 126; McDermott v. People, 5 Parker, Cr. R. 104; Mackesey v. People, 6 Parker, Cr. R. 114; 1 Am. & Eng. Enc. Law, tit. "Attempt." So far as the thief is concerned, the felonious design and action are then just as complete as though the crime could have been, or, in fact, had been, committed, and the punishment of such offender is just as essential to the protection of the public as of one whose designs have been successful. In the language of Bouvier's Law Dictionary, an "attempt" is an endeavor to do an act carried beyond mere preparation, but falling short of execution. Some conflict has been observed in English authorities on this subject, and it may be conceded that the weight of authority in that country is in favor of the proposition that a person cannot be convicted of an attempt to steal from the pocket, without proof that there was something in the pocket to steal. Reg. v. McPherson (1857) Dears. & B. Crown Cas. 197; Reg. v. Collins (1864) Leigh & C. 471. The cases in England, however, are not uniform on this subject, and the principle involved in the cases above cited was, we think, otherwise stated in Reg. v. Goodall, 2 Cox, Cr. Cas.

41, where an attempt to commit a miscarriage was held to have been perpetrated on the body of a woman who was not at the time pregnant. See, also, Reg. v. Goodchild, 2 Car. & K. 293. In this country, however, the courts have uniformly refused to follow the cases of Reg. v. McPherson and Reg. v. Collins, and have adopted the more logical and rational rule that an attempt to commit a crime may be effectual, although, for some reason undiscoverable by the intending perpetrator, the crime, under existing circumstances, may be incapable of accomplishment. It would seem to be quite absurd to hold that an attempt to steal property from a person could not be predicated of a case where that person had secretly and suddenly removed the contents of one pocket to another and thus frustrated the attempt, or had so guarded his property that it could not be detached from his person. An attempt is made when an opportunity occurs, and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle or condition. Many efforts have been made to reach the North Pole, but none have thus far succeeded, and many have grappled with the theory of perpetual motion without success,—possibly from the fact of its non-existence,—but can it be said in either case that the attempt was not made? It was well stated by Justice Gray in Com. v. Jacobs, 9 Allen, 274, that "whenever the law makes one step towards the accomplishment of an unlawful object with the intent or purpose of accomplishing it criminally, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." * * * The case of People v. Jones (46 Mich. 441) is also in point. There the accused thrust his hand into the outside cloak pocket of a woman, but there was nothing in the pocket. It was held that the defendant was well convicted of the crime of attempting to commit larceny.

* * * * * * * * *

The order of the general term should be reversed, and the judgment of the court of general sessions affirmed. All concur, except Andrews, J., taking no part.

Order reversed and judgment affirmed.

Attempt—Legal Inability to Commit Crime Intended.

MARLEY v. STATE.

58 N. J. Law 207. 1895.

BEASLEY, C. J. The defendants were indicted for incurring an obligation in behalf of the county in excess of the legal limit. The indictment sets out, in detail, the several acts done by them to that end, and the proofs corresponded with such allegations. The case, therefore, that was made by the indictment was in all respects proved. In this situation the trial court concluded that the series of acts so done by the defendants was, as a matter of law, wholly nugatory; that such acts did not and could not impose any legal obligation on the county. * * *

It has been entirely settled by judicial decisions that the act which it is declared that these defendants attempted to do cannot be done by the method stated in the indictment. As the law has been expounded, the board of freeholders, to which they regularly belonged, under the existent circumstances, could not impose upon the county the obligation in question. Siedler v. Chosen Freeholders, &c., 10 Vroom, 632. And so far was this doctrine extended that in the Circuit Court of the United States in the case of Crampton v. Zabriskie, 101 U. S., 601, it was held that where the county bonds had been given for lands conveyed to the county, such bonds being in excess of the funds appropriated, such transaction is, in all its parts, utterly void, and a decree was accordingly made requiring the vendor of the property to accept a reconveyance and to return the bonds so given in payment of the purchase-money. This decree was affirmed in the Supreme Court of the United States, on the ground that the board of freeholders could not, in the mode adopted, incur any obligation for the county beyond its income previously provided by taxation. And this, as has been shown, was the doctrine in accordance with which the present case was tried.

Looking, then, to this datum it is obvious that the defendants have been convicted of an attempt to commit a misdemeanor which was a legal impossibility, and which they knew to be such.

Such a procedure would appear to be inconsistent with the fundamental principles of law applicable to the subject.

An intent to commit a crime is not equivalent to an attempt to commit it, for the purpose must be accompanied with some substantive act, or series of acts, tending towards its accomplishment. Mr. Bishop, with his usual explicitness and clearness, says: "Another principle concerning attempt is that, whatever a man's intent may be, he is not indictable unless there is some adaptation, real or apparent, in the thing done to accomplish the thing intended." 1 Bish. Cr. L., § 516. So, speaking of the intent, "everyone being conclusively presumed to understand the law, no man can legally intend what is legally impossible." Id., § 518.

In the light of such a theory it becomes plain that these defendants, even if the intent to commit the offence charged can be imputed to them, did, in legal contemplation, no act towards the accomplishment of such purpose, for every act they did was, in the eye of the law, an absolute nullity. Not one of them, therefore, could tend to carry into effect any criminal project.

It should be noticed that the principle here introduced is to be distinguished from the rule that is applicable to the case of a person designing to perpetrate a crime, when he cannot effect it by reason of the existence of some fact unknown to him at the time. The cases are collated and the principle elucidated in the recent case of People v. Gardner, 38 N. E. Rep., 1003. State v. Wilson, 30 Conn., 500.

As it may suggest itself to a person looking into the subject thus considered that the rule adopted by the trial judge in its application to the primary question before him is not consistent with the decision in State v. Halsted, 10 Vroom, 402, 12 Id., 552, it is proper to say that such topic was not in the reported case discussed by counsel, nor was it considered or decided by the court. The proposition that the freeholders have not the power to create an obligation binding on the county by the methods now in question has been established by more recent decisions.

Let the judgment be reversed.

PART III

SPECIFIC CRIMES

CHAPTER XII.

BATTERY.

Elements of the Crime.

KIRLAND v. STATE.

43 Ind. 146. 1873.

Indictment for assault and battery.

BUSKIRK, J., * * * The most accurate and complete definition of a battery that we have met with is that given by Saunders, and which has been adopted by most subsequent writers, and that is: "A battery is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him." By this definition, it is an essential prerequisite that the person must either be touched by the aggressor himself or by the substance put in motion by him. There must be a touching of the person. One's wearing apparel is so intimately connected with the person, as in law to be regarded, in case of a battery, as a part of the person. So is a cane when in the hand of the person assaulted. But in the case under consideration, the court ignores all these things and instructs the jury to convict on proof alone of the striking of the horses of the prosecuting witness. It is not even necessary, according to this charge, that the prosecuting witness should have been in the wagon or holding the lines, or connected with or attached to the horses in any way. That Bein was driving his team and gathering his corn does not necessarily so connect him with the horses that the touching of the horses would be an assault and battery on him. He may have been, as is frequently done, driving his horses from one pile of corn to another, by words of command, without being in the wagon or having hold of the lines. Reversed, and new trial granted.

CHAPTER XIV.

ABORTION AND RAPE.

Rape.

DON MORAN v. PEOPLE.

25 Mich. 356. 1872.

CHRISTIANCY, C. J. The court charged the jury as follows:

If you find that the defendant represented to the complaining witness that, as a part of his medical treatment, it was necessary for her to have carnal connection with him; that such representations were false and fraudulent; that she believed it, and relying upon it, consented to the solicitations of the defendant, and had connection with him; and that such representations were made for the purpose of inducing her to give such consent, and that without it she would not have yielded, the defendant is guilty of the crime charged against him.

It will be noticed that this charge leaves out and wholly ignores all idea of force as a necessary element of the crime charged; and the jury were, in effect, told that the defendant might be found guilty of the rape, though he neither used, nor threatened to use, any force whatever in case of her refusal, and though she might have assented without any constraint produced by the fear or apprehension of force, or any dangerous, or serious, consequences to herself, if she refused or resisted.

This feature of the charge is assigned as error, and presents the only question raised in the case by the plaintiff in error.

The definition of rape as generally given in the English books, is, that "rape is the unlawful carnal knowledge, by a man of a woman, forcibly (or by force), and against her will;" 3 Coke's Inst. (Thomas Ed.), 549; 1 Hale, P. C., 628; Hawkins P. C. (Cur. Ed.), 122; 4 Bl. Com., 210; 1 Russ. on Cr. (Greanl. Ed.), 675. This definition depended, perhaps, partly upon the common law, but mainly upon two early, and rather loosely worded,

English statutes, one of which, Stat. Westm. 2, ch. 34, expressly made force an element in the crime, if the party were attainted at the king's suit (though not when the proceeding was by appeal), and the other, Stat. Westm. 1, ch. 13, which did not require force as an element, except as it might be inferred from the word "ravished;" see 2 Bish. Cr. L., §§ 1067 to 1069, where the substance of these statutes is given. And, as remarked by Mr. Bishop, 2 Bish. Cr. L., § 1073, the more correct definition to be gathered from these statutes would have been, "Rape is the unlawful carnal knowledge, by a man of a woman, by force, when she does not consent." The difference between the two definitions, however, would seem to be important only in cases where the female, with whom the connection is had, may be said to have no will, as in the case of an idiot, or insane person, or one in a state of unconsciousness, in which cases, if anywhere, the force necessary to accomplish the act itself without resistance, could possibly be held to constitute the force contemplated by the definition of the offense; see Rex v. Ryan, 2 Cox C. C., 115; Reg. v. Fletcher, Bell C. C., 63; Reg. v. Camplin, 1 Den. C. C., 89. But this particular class of cases has no special bearing upon the case now before us (and we do not discuss it); nor are we embarrassed by any uncertainty in the definition of the offense.

Our statute has adopted substantially the definition first above given from the English authorities. § 5730, Compiled Laws (of 1857), declares, "If any person shall ravish and carnally know any female of the age of ten years or more, by force and against her will, * * * he shall be punished," etc.

In the interpretation of this statute, it is clear that the terms, "by force," must not be wholly rejected or ignored, but that some effect must be given to them; and the language of the provision certainly requires something more to be shown than if these words had been omitted; and it is equally clear that if that particular kind and amount of force only is required which is always essential to the act of sexual connection itself, when performed with the assent of the woman, then no effect whatever is given to the terms, "by force," but the interpretation and the effect of the statute will be precisely the same as if these words were not contained in it. This interpretation, therefore, is not permissible. Some effect must be given to the words; and such has been the almost, if not entirely, uniform course of decision,

both in England and in this country, where the definition of the offense is substantially the same as that given by our statute, when the charge has been for the actual commission of the rape upon a female of the age of proper discretion, of sound mind, and in full possession of her faculties, however fraudulent the means, or false the pretenses, by which her consent was procured. I have not been able to find a single well authenticated case, where the question was directly raised, in which it has been directly decided the other way. * * *

The true rule as to force in cases of rape generally, was recognized by this court in People v. Valentine Cornwell (not Croswell v. The People, as printed in the report), 13 Mich., 433, where it was said, that "the essence of the crime is not the fact of intercourse, but the injury and outrage to the feelings of the woman by means of the carnal knowledge effected by force." And there being no force used or threatened in that case, but strong grounds for believing that the woman was the soliciting party, the connection was properly held not to constitute rape, though the woman was not of sound mind, and had no intelligent understanding at the time the act was committed, but was in good physical health. In cases where the woman is entirely insensible from idiocy, or from the effect of drugs administered (though the point is not here involved), it may be entirely right to hold a very slight degree of force sufficient; and that amount of force which, in such cases, would always be necessary, beyond what would be required with a consenting party, might, perhaps, properly be held, as it sometimes has been held, sufficient to make the transaction a rape, as suggested by my brother Cooley in People v. Cornwell, *ubi supra.*

And when drugs are administered, or procured to be administered, by the criminal, for the purpose of taking away or lessening the power of resistance, and having that effect, there may be no ground for distinction between the force thus exerted by him through the agency of the drugs, and that directly exerted by his hand and for the same purpose.

The only question really involved in People v. Cornwell, above cited, was whether, under the circumstances of that case, the defendant could be held guilty without proof of force in any form, actual, or threatened, and it was, I think, properly held by us that he could not.

If the statute, or the definition of rape, did not contain the words "by force," or "forcibly," doubtless a consent procured by such fraud as that referred to, might be treated as no consent; but the idea of force cannot be thus left out and ignored, nor can such fraud be allowed to supply its place, though it would doubtless supply, and satisfy, all the other terms of the definition; and, so far as the intimation in question is to be understood as going further and dispensing with all idea of force, it must be understood as an intimation of the court of what, in their opinion, the law ought to be, rather than what it is. And, upon abstract principles of right and wrong, a sexual connection obtained by falsely and fraudulently personating the husband of a woman, or by a physician fraudulently inducing a female patient to believe such connection essential to a course of medical treatment, must be considered nearly, if not quite, as criminal and prejudicial to society as when obtained by force or any apprehension of violence; and it might, and in my opinion would, be judicious for the legislature to make some provision for punishment in cases of this kind. But it is not for the judiciary to legislate, by straining the existing criminal law to bring such cases within it.

For the reasons given, I think the judgment of the recorder's court should be reversed, and a new trial awarded.

And with reference to a new trial, it is proper for the guidance of the recorder's court, to consider the nature of the evidence set forth in the record, and which will probably appear upon the new trial, and to determine what charge the state of facts would warrant; or, whether there was anything in the evidence which would authorize the jury to find that the carnal connection was obtained "by force, and against the will" of the party injured.

We think it is well and properly settled that the terms, "by force," do not necessarily imply the positive exertion of actual physical force in the act of compelling submission of the female to the sexual connection; but that force or violence threatened as the result of non-compliance, and for the purpose of preventing resistance, or extorting consent, if it be such as to create a real apprehension of dangerous consequences, or great bodily harm, or such as in any manner to overpower the mind of the victim so that she dare not resist is, and upon all sound principles must be, regarded, for this purpose, as in all respects

equivalent to force actually exerted for the same purpose. See Reg. v. Hallett, 9 C. & P., 748; Reg. v. Day, id., 722; Wright v. The State, 4 Humph. 194; Pleasant v. The State, 8 Eng., 360; and see Strang v. The People, 24 Mich., 1. Nor, as appears by the case last cited, need the threats be of force to be used in accomplishing the act; as in that case the principal threat was, that if she refused he would take her away where she could never get back. In fact, we think the terms of the statute in reference to force, are satisfied by any sexual intercourse to which the woman may have been induced to yield, only through the constraint produced by the fear of great bodily harm, or danger of life or limb, which the prisoner has, for the purpose of overcoming her will, caused her to apprehend, as the consequence of her refusal, and without which she would not have yielded.

It remains only to apply these principles to the present case.

Considering the way, and the purpose for which the girl had been placed by her father under the care and treatment of the defendant, as her physician, the evidence had a tendency to show, and the jury might properly have found, that the girl was induced by the defendant to submit to the sexual intercourse with him, from the fear and under the apprehension, falsely and fraudulently inspired by the defendant for the purpose of overcoming her opposition, that, if she did not yield to such intercourse, he intended to, and would, use instruments "for the purpose of enlarging the parts," and that such operation with instruments would be likely to kill her. And if the jury should so find—with or without the other facts submitted to them by the charge given—and that she would not otherwise have yielded, it would be their duty to find the defendant guilty of the crime charged.

The judgment must be reversed, and a new trial awarded.

CHAPTER XV.

HOMICIDE.

Act Causing Death—Cause and Condition.

COMMONWEALTH v. CAMPBELL.

7 Allen 541 (Mass.). 1863.

Indictment for murder, by shooting William Currier on the 14th of July, 1863. The trial took place in December, 1863, before Bigelow, C. J., and Metcalf, Merrick, and Hoar, JJ.

The homicide was committed near the armory in Cooper street, in Boston, at about seven o'clock in the evening, during a riot which grew out of the enforcement of a draft of men for the army; and the evidence offered by the government tended to show that the prisoner was there participating in the riot, with a large number of other persons. The Attorney-General offered evidence to show riotous acts by him in Charlestown street, at about one o'clock in the afternoon of the same day. This evidence was objected to, and the court, after consultation, rendered the following decision: * * *

It appeared that a military force was called out to suppress the riot in Cooper street, and was stationed in the armory, and that the mob were fired upon by the soldiers, and the soldiers by the mob. After the evidence on both sides was closed, the Attorney-General requested, for the convenience of counsel, a decision upon the following prayer for instructions: "That, whether Currier was killed by a shot from within or without the armory, all the parties unlawfully engaged in the transactions which resulted in the homicide were at common law guilty, at least of manslaughter."

The court, after argument and an adjournment, rendered the following decision:

BIGELOW, C. J. The instruction asked for by the Attorney-General, as we understand it, is substantially this: If the

defendant was a participator in the riotous assembly, and, during the attack made by it on the armory, a homicide took place the defendant is in law guilty of manslaughter, although the evidence may fail to show whether the shot which killed the deceased was fired by the rioters with whom the prisoner was acting in concert, or by the soldiers who were within the armory, and engaged in resisting the attack made upon the building by the rioters outside. This seems to us to present a novel question. No authority has been cited which directly supports the position assumed by the Attorney-General, and so far as we know there is none to be found. This consideration, though by no means decisive, is entitled to some weight, because the law of homicide, in its application to almost every variety and combination of circumstances, especially to the taking of life by persons engaged in a tumult or riot, or other unlawful enterprise or design, is perhaps more fully and clearly settled than any other branch of the law. But we are bound to examine the question further, and ascertain, if we can, whether the doctrine in question has any just foundation in the recognized principles of law by which criminal responsibility for the acts of others is regulated and governed.

There can be no doubt of the general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable *criminaliter* for the acts of each and all who participate with him in the execution of the unlawful design. As they all act in concert for a common object, each is the agent of all the others, and the acts done are therefore the acts of each and all. This doctrine as applied to cases of homicide is fully stated in 1 Hale, P. C. 441, in a quotation from Dalton, in these words: "If divers persons come in one company to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party, abetting him and consenting to the act, or ready to aid him, although they did but look on." So in 1 East, P. C. 257, it is laid down that "where divers persons resolve generally to resist all opposers in the commission of any breach of the peace,

and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must at their peril abide the event of their actions;" and if in doing any of these or similar acts any person interfering with them is killed, all who took part in the fact, or abetted thereto, are guilty of murder. These citations, to which many others of a similar tenor might be added, show that the rule of criminal responsibility for the acts of others is subject to the reasonable limitation that the particular act of one of a party for which his associates and confederates are to be held liable must be shown to have been done for the furtherance or in prosecution of the common object and design for which they combined together. Without such limitation a person might be held responsible for acts which were not the natural or necessary consequences of the enterprise or undertaking in which he was engaged, and which he could not either in fact or in law be deemed to have contemplated or intended. No person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand, or by some one acting in concert with him or in furtherance of a common object or purpose. Certainly that cannot be said to be an act of a party, in any just sense, or on any sound legal principle, which is not only not done by him, or by any one with whom he is associated or connected in a common enterprise, or in attempting to accomplish the same end, but is committed by a person who is his direct and immediate adversary, and who is, at the moment when the alleged criminal act is done, actually engaged in opposing and resisting him and his confederates and abettors in the accomplishment of the unlawful object for which they are united. Suppose, for example, a burglar attempts to break into a dwelling house, and the owner or occupant, while striving to resist and prevent the unlawful entrance, by misadventure kills his own servant. Can the burglar in such case be deemed guilty of criminal homicide? Certainly not. The act was not done by him, or with his knowledge or consent, nor was it a necessary or natural consequence of the commission of the offense in which he was engaged. He could not therefore have contem-

plated or intended it. Another illustration will perhaps be more apposite to the case before us. Suppose, during the progress of the riot in which it is alleged the prisoner was engaged, and while the soldiers and others in possession of the armory were in the act of repelling the attack of the mob in the street, by firing upon it with the cannon which was used on the occasion, that it had burst, by reason of some secret defects, and killed several of those who were in its immediate vicinity, or that a soldier, while handling his musket, had by accident inflicted a mortal wound on himself. It would hardly be contended that in either of these cases the whole body of the rioters could be held legally responsible for criminal homicide, by reason of the lives that were thus destroyed. And yet there is no real distinction between the cases supposed and that of the prisoner at the bar, if the rule insisted upon by the Attorney-General is a sound one. The taking of human life under the circumstances supposed, in a certain sense, was the result of the unlawful acts of the mob—that is, it would not have occurred but for the riot which furnished the cause and occasion of the use of the musket or cannon.

Indeed, it seems to us that in every aspect the doctrine contended for, if followed to its legitimate and logical conclusion, would lead to extraordinary consequences. It would render everybody who participated in a transaction, whether acting in concert or in opposition, whether united in a common design or arrayed on opposite sides in a contest or affray in which each contending party was striving to defeat the purpose of the other, if all acted without legal justification, responsible for every criminal act which was done by any person during the progress of the affair in which they were all engaged. Nor, in applying the principle in question to a case like the one before us, can we see any good reason why the soldiers who defended the armory and resisted the mob, if it should turn out that they acted without sufficient legal authority to justify their acts, might not be held guilty of manslaughter or homicide committed by the rioters, if the latter are to be held responsible for deaths caused by the acts of the soldiers. But the rules of law do not give any countenance to such a doctrine. The real distinction is between acts which a man does either actually or constructively, by himself or his agents or confederates, and

those which were done by others, acting not in concert with him, or to effect a common object, but without his knowledge or assent, either express or implied. For the former the law holds him strictly responsible, and for all their necessary and natural consequences which he is rightfully deemed to have contemplated and intended. For the latter he is not liable, because they are not done by himself, or by those with whom he is associated, and no design to commit them, or intent to bring about the results which flow from them, can be reasonably imputed to him. So the rule of law was manifestly understood by the framers of the clause contained in Rev. St. c. 129, § 6, re-enacted in Gen. St. c. 164, § 6, which provides that if any officer, magistrate, or other person acting in the suppression of an unlawful assembly, tumult, or riot, is killed or wounded, all persons taking part in such violation of law shall be answerable therefor. This was clearly not intended as a limitation of the liability at common law, but only as declaratory of the rule as it then existed and was understood. * * *

The jury will accordingly be instructed, that, unless they are satisfied beyond a reasonable doubt that the deceased was killed by means of a gun or other deadly weapon in the hands of the prisoner, or of one of the rioters with whom he was associated and acting, he is entitled to an acquittal.

COMMONWEALTH v. HACKETT.

2 Allen 136 (Mass.). 1861.

Indictment for the murder of Henry Gillen.

At the trial in this court, evidence was offered by the government tending to show that the defendant suddenly approached the deceased in the night, and stabbed him in two places in the abdomen, and immediately ran away; and that the deceased died nineteen days thereafter. At the moment when the stabs were inflicted, Gillen cried out, "I'm stabbed." John Butler, a witness for the commonwealth, testified that he heard these words, and at once went to Gillen, and reached him within twenty seconds after the exclamation was made, and was the first person who got there. The Attorney-General then put to the witness this question: "When you got to Gillen, what did he say, if

anything?" This question was objected to, but allowed to be put, and the witness answered that the deceased said: "I'm stabbed. I'm gone. Dan Hackett has stabbed me."

The defendant contended that there was evidence to show that the wounds of the deceased were unskillfully and improperly treated by the surgeons who attended him, and requested the court to instruct the jury as follows: "(1) The rule that the death must happen within a year and a day is one of limitation only, and does not change the burden of proof, or release the government from the duty of proving affirmatively that the deceased died of the wounds alleged in the indictment. (2) It is not enough to satisfy this burden for the government to prove that without the wounds the deceased would not have died. (3) If the death was caused by the improper applications or improper acts of the surgeons in dressing the wounds, the case of the government is not made out."

The court instructed the jury in conformity with the first clause of the instructions asked for, but declined to give the others. * * *

BIGELOW, C. J. The court have given to this case the most careful and deliberate consideration, not only on account of the very grave nature of the charge of which the defendant has been found guilty, but also because the exceptions taken at the trial have been urged by the learned counsel for the prisoner with great earnestness and apparent confidence. * * *

We have looked with care into the authorities which bear on the correctness of the instructions given to the jury, relating to the unskillful or improper treatment of the wounds alleged to have been inflicted by the prisoner upon the body of the deceased. We find them to be clear and uniform, from the earliest to the latest decisions. In one of the first reported cases it is said that "though a wound may be cured, yet if the party dyeth thereof, it is murder." Rex v. Reading, 1 Keb. 17. The same principle is stated in 1 Hale, P. C. 428, thus: "If a man give another a stroke which it may be is not in itself so mortal but that with good care he might be cured, yet if he die of this wound within a year and a day, it is homicide or murder, as the case is, and so it has been always ruled." "If a man receives a wound, which is not in itself mortal, but either for want of helpful applications,

or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or wound, for that wound, though it were not the immediate cause of his death, yet, if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati.*" In Rew's Case, as stated in 1 East, P. C. c. 5, § 113, it was determined that "though the stroke were not so mortal in itself but that with good care and under favorable circumstances the party might have recovered, yet if it were such from whence the danger might ensue, and the party neglected it, or applied inefficacious medicines, whereby the wound which at first was not mortal in itself turned to a gangrene, or produced a fever, whereof he died, the party striking shall answer for it, being the immediate cause of the death." J. Kelyng, 26. So, in a more recent case, the jury were instructed that if the defendant wilfully and without justifiable cause inflicted a wound, which was ultimately the cause of death, it made no difference whether the wound was in its nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment. The real question is, was the wound the cause of death? Reg. v. Holland, 2 Moody & R. 351. From these and other authorities, the well established rule of the common law would seem to be, that if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offense of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskillful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. 1 Russ. Crimes (7th Am. Ed.) 505; Roscoe, Cr. Ev. (3d Ed.) 703, 706; 3 Greenl. Ev. § 139; Com. v. Green, 1 Ashm. 289; Reg. v. Haines, 2 Car. & K. 368; State v. Baker, 1 Jones (N. C.) 267; Com. v. M'Pike, 3 Cush. 184. The principle on which this rule is founded is one of universal application, and lies at the foundation of all our criminal jurisprudence. It is, that every person is to be

held to contemplate and to be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes co-operated in producing the fatal result. Indeed, it may be said that neglect of the wound or its unskillful and improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible. But however this may be, it is certain that the rule of law, as stated in the authorities above cited, has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime, and to take away from human life a salutary and essential safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant on the treatment of bodily ailments and injuries, it would be easy in many cases of homicide to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crime might escape conviction and punishment.

The instructions to the jury at the trial of this case were in strict conformity with the rule of law as it has always been understood and administered. Indeed, the learned counsel does not attempt to show that it has ever been held otherwise. His argument on this point is confined to the signification which he attributes to the word "maltreatment." This he assumes to be either wilful treatment, involving bad faith, of the wound of the deceased, or such gross carelessness in its management by the surgeons as would amount to criminality. But such is not its true meaning. Maltreatment may result either from ignorance, neglect or wilfulness. It is synonymous with bad treatment, and does not imply, necessarily, that the conduct of the surgeons, in their treatment of the wounds of the deceased, was either wilfully or grossly careless. Nor was it used in any such narrow or restricted sense in the instructions given to the jury. On the contrary, in the connection in which it stands, it signifies only improper or unskillful treatment, and was intended to apply to the evidence as it was developed at the trial, and to meet the specific prayer for instruction on this point, which was submitted

in behalf of the prisoner. There is nothing in the exceptions which shows that there was any evidence of gross carelessness or wilful mismanagement on the part of the surgeons; nor was any such suggestion made at the trial. The statement in the exceptions is that "the defendant contended that there was evidence to show that the wounds of the deceased were unskillfully and improperly treated by the surgeons who attended him," and the instruction asked for by the learned counsel refer only to improper applications and improper acts of the surgeons, and contain no intimation of any defense founded on alleged bad faith or criminal neglect in the treatment of the wounds inflicted by the prisoner on the body of the deceased. The distinction now suggested between maltreatment occasioned by such causes, and that arising from a want of due care and skill, (if well founded, on which point we express no opinion), was not raised at the trial, and cannot be the foundation for setting aside the verdict.

Exceptions were overruled.

The Person Killed.

STATE v. WINTHROP.

43 Iowa 519. 1876.

ADAMS, J. The defendant is a physician, and was employed by one Roxia Clayton to attend her in childbirth. The child died. The defendant is charged with having produced its death. Evidence was introduced by the state tending to show that the child, previous to its death, respired and had an independent circulation. Evidence was introduced by the defendant tending to disprove such facts.

The defendant asked the court to give the following instructions:

"To constitute a human being, in the view of the law, the child mentioned in the indictment must have been fully born, and born alive, having an independent circulation and existence separate from the mother, but it is immaterial whether the umbilical cord which connects it with the mother be severed or not."

The court refused to give this instruction, and gave the following:

"If the child is fully delivered from the body of the mother, while the afterbirth is not, and the two are connected by the umbilical cord, and the child has independent life, no matter whether it has breathed or not, or an independent circulation has been established or not, it is a human being, on which the crime of murder may be perpetrated."

The giving of this instruction, and the refusal to instruct as asked, are assigned as error. * * *

Where a child is born alive, and the umbilical cord is not severed, and independent circulation has not been established, independent life is impossible, and the instruction amounts to this, that if the jury should find independent life under such circumstances, although it would be impossible, they might find the killing of the child to be murder. Such an instruction could serve no valuable purpose, and would necessarily involve the jury in confusion. It would do worse than that; it would tell the jury in effect that they might find independence of life in utter disregard of the conditions in which alone it could exist. To show how the defendant was prejudiced, if the instruction is to be viewed in this light, we may say that there was evidence that the *ductus arteriosus* was not closed. This evidence tended to show, slightly at least, that independent circulation had not been established. The instruction told the jury, by implication, that they might disregard this evidence. But we feel compelled to say that we do not think that the Attorney-General's interpretation of the instruction ever occurred to the court below. It is plain to see that the court below meant that independent life is not conditioned upon independent circulation. The error, if there was one, consisted in assuming that it was not. The question presented for our determination is by no means free from difficulty. Can the child have an independent life, while its circulation is still dependent upon the mother? There are two senses in which the word independence may be used. There is actual independence, and there is potential independence. A child is actually independent of its father when it is earning its own living; it is potentially independent when it is capable of earning its own living. We think the court below used the word *independent* in the latter sense. While

the blood of the child circulates through the *placenta,* it is renovated through the lungs of the mother. In such sense it breathes through the lungs of the mother. Wharton & Stille's Medical Jurisprudence, 2 Vol., § 128. It has no occasion during that period to breathe through its own lungs. But when the resource of its mother's lungs is denied it, then arises the exigency of establishing independent respiration and independent circulation. Children, it seems, oftentimes do not breathe immediately upon being born, but if the umbilical cord is severed, they must then breathe or die. Cases are recorded, it is true, where a child has been wholly severed from the mother, and respiration has not apparently been established until after the lapse of several minutes of time. During that time it must have had circulation, and the circulation was independent. Whether it had inappreciable respiration, or was in the condition of the person holding his breath, is a question not necessary to be considered for the determination of this case. It is sufficient to say, that while the circulation of the child is still dependent, its connection with the mother may be suddenly severed by artificial means, and the child not necessarily die. This is proven by what is called the Cæsarian operation. A live child is cut out of a dead mother and survives. Such a child has a potential independence antecedent to its actual independence. So a child which has been born, but has not breathed, and is connected with the mother by the umbilical cord, may have the power to establish a new life upon its own resources antecedent to its exercise. According to the opinion of the court below, the killing of the child at that time may be murder. It is true that after a child is born that it can no longer be called a *fœtus,* according to the ordinary meaning of that word. Beck says, however, in his Medical Juris., 1 Vol., 498: "It must be evident that when a child is born alive, but has not yet respired, its condition is precisely like that of the *fœtus in utro.* It lives merely because the *fœtal* circulation is still going on. In this case none of the organs undergo any change." Casper says, in his Forensic Medicine, 3 Vol., 33: "In *foro* the term 'life' must be regarded as perfectly synonymous with 'respiration.' Life means respiration. Not to have breathed is not to have lived."

While, as we have seen, life has been maintained independent

of the mother without appreciable respiration, the quotations above made indicate how radical the difference is regarded between *fœtal* life and the new life which succeeds upon the establishment of respiration and independent circulation.

If we turn from the treatise on Medical Jurisprudence to the reported decisions, we find this difference, which is so emphasized in the former, made in the latter the practical test for determining when a child becomes a human being in such a sense as to become the subject of homicide. In Rex v. Enoch, 5 C. & P., 539, Mr. Justice J. Parker said: "The child might have breathed before it was born, but its having breathed is not sufficiently life to make the killing of the child murder. There must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose."

In Regina v. Trilloe, 1 Carrington & Marshman, 650, Erskine, J., in charging the jury, said: "If you are satisfied that this child had been wholly produced from the body of the prisoner alive, and that the prisoner wilfully and of malice aforethought strangled the child, after it had been so produced, and while it was alive, and while it had an independent circulation of its own, I am of the opinion that the charge is made out against the prisoner." See also Greenleaf on Ev., 3 Vol., § 136.

It may be asked why, if there is a possibility of independent life, the killing of such a child might not be murder.

The answer is, that there is no way of proving that such possibility existed if actual independence was never established. Any verdict based upon such finding would be the result of conjecture.

Reversed.

CHAPTER XVI.

MURDER.

Elements of the Crime.

STATE v. SMITH.

2 Strob. 77 (S. C.). 1847.

Before Mr. Justice Wardlaw, at Marion, fall term, 1847.

Indictment against one Smith for murder.

The evidence showed that the defendant had fired his pistol in the direction of one Carter, who was in a crowd, and that the shot missed Carter, but took effect upon and killed a little negro boy. The defendant claimed, and there was evidence tending to show, that he did not know of the boy's presence, and, further than this, that he did not actually intend to kill, or even hit, Carter, but merely intended to scare Carter's horse, and make it throw him; and that the defendant thought he had elevated his pistol sufficiently to avoid hitting anybody.

The court charged that, if the defendant shot at Carter, designing some serious injury, as the falling from his horse, the killing of the boy was murder.

The defendant was convicted of murder, and appealed.

EVANS, J. The jury having found the prisoner guilty of murder, there is no necessity to enquire whether he could have been convicted of manslaughter on this indictment. The first ground is, therefore, the only one necessary to be considered. The proposition presented by that ground is whether, supposing the prisoner "shot at Carter, designing to do him some serious injury, as the falling from his horse," he is guilty of the crime of murder. It is not denied that this question is the same as if he had killed Carter instead of the negro, for, if one design to kill A., but by accident kills B., his crime is the same as if he had executed his intended purpose. It will be murder or man-

slaughter or self-defence, according to the circumstances. It is very clear that the intent with which an act is done very often gives character to the crime, but there is a legal conclusion drawn from the facts of the case, entirely independent of the intent of the party.

Thus it is said in 2 Starkie, Ev. 950, that: "Where the defence is that the death was occasioned by accident, the nature of the act which produced the death, and the real motive and intention of the prisoner, are the proper subjects of evidence; but the conclusion as to the quality of the offence, as founded upon such facts, is a question of law." The whole doctrine of constructive malice is founded on the same principle. If the act which produced the death be attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, the law, from these circumstances, will imply malice, without reference to what was passing in the prisoner's mind at the time he committed the act. If one were to fire a loaded gun into a crowd, or throw a piece of heavy timber from the top of a house into a street filled with people, the law would infer malice from the wickedness of the act. So, also, the law will imply that the prisoner intended the natural and probable consequence of his own act; as, in the case of shooting a gun into a crowd, the law will imply, from the wantonness of the act, that he intended to kill some one, although it might have been done in sport. If the prisoner's object had been nothing more than to make Carter's horse throw him, and he had used such means only as were appropriate to that end, then there would be some reason for applying to his case the distinction that, where the intention was to commit only a trespass or a misdemeanor, an accidental killing would be only manslaughter. But in this case the act done indicated an intention to kill; it was calculated to produce that effect, and no other death was the probable consequence, and did result from it; and I am of opinion there was no error in the charge of the circuit judge that, if the prisoner shot at Carter, the crime was murder, although the prisoner may have designed only to do Carter "some serious injury, as the falling from his horse." The motion is therefore dismissed.

Richardson, O'Neall, Wardlaw, Frost, and Withers, JJ., concurred.

WELLAR v. PEOPLE.

30 Mich. 16. 1874.

Error to circuit court, Saginaw county.

CAMPBELL, J. Plaintiff in error was convicted of the murder of Margaret Campbell by personal violence committed on July 25, 1873. They had lived together for several months, and on the occasion of her death she had been out on an errand of her own in the neighborhood, and on coming back into the house entered the front door of the bar-room, and fell, or was knocked down, upon the floor. While on the floor there was evidence tending to show that Wellar ordered her to get up, and kicked her, and that he drew her from the bar-room through the dining-room into a bed-room, where he left her, and where she afterwards died. The injury of which she died was inflicted on her left temple, and the evidence does not seem to have been clear how she received it, or at what specific time. It was claimed by the prosecution to have been inflicted by a blow when she first came in, and, if not, then by a blow or kick afterwards. All of the testimony is not returned, and the principal questions arise out of rulings which depend on the assumption that the jury might find that her death was caused by some violent act of Wellar's; which they must have done to convict him. There can be no question but that, if she so came to her death, he was guilty of either murder or manslaughter. The complaint made against the charge is that a theory was put to the jury on which they were instructed to find as murder what would, or at least might, be manslaughter.

There was no proof tending to show the use of any weapon, and, if we may judge from the charge, the prosecution claimed the fatal injury came from a blow of Wellar's fist, given as she entered the house. The judge seems to have regarded it as shown by a preponderance of proof that the injury was visible when she was in the bar-room, and that the principal dispute was as to how it was caused,—whether by a blow, or kick, or by accident. It also appears that, if inflicted in that room, it did not produce insensibility at the time, if inflicted before the prisoner dragged her into the bed-room. It does not appear from the case at what hour she died. * * *

Upon any of the theories presented, there is no difficulty in seeing that if Wellar killed the deceased, and if he distinctly intended to kill her, his crime was murder. It is not claimed on his behalf that there was any proof which could reduce the act to manslaughter if there was a specific design to take life. Upon this the charge was full and pointed, and is not complained of. There was no claim that he had been provoked in such a way or to such an extent as to mitigate intentional slaying to anything below one of the degrees of murder.

But it is claimed that although the injury given was fatal, yet, if not intended to produce any such results, it was of such a character that the jury might, and properly should, have considered it as resting on different grounds from those which determine responsibility for acts done with deadly weapons used in a way likely to produce dangerous consequences. But the charge of the court did not permit them to take that view.

It will be found, by careful inspection of the charge, that the court specifically instructed the jury that, if Wellar committed the homicide at all, it would be murder, and not manslaughter, unless it was committed under such extreme provocation as is recognized in the authorities as sufficient to reduce intentional and voluntary homicide committed with a deadly weapon to that degree of crime. And in this connection the charge further given, that, if the intent of the respondent was to commit bodily harm, he was responsible for the result, because he acted wilfully and maliciously in doing the injury necessarily led to a conviction of murder, because there was no pretense of any provocation of that kind.

Manslaughter is a very serious felony, and may be punished severely. The discretionary punishment for murder in the second degree comes considerably short of the maximum punishment for manslaughter. But the distinction is a vital one, resting chiefly on the greater disregard of human life shown in the higher crime. And, in determining whether a person who has killed another without meaning to kill him is guilty of murder or manslaughter, the nature and the extent of the injury or wrong which was actually intended must usually be of controlling importance.

It is not necessary in all cases that one held for murder must have intended to take the life of the person he slays by his wrong-

ful act. It is not always necessary that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted shall be equivalent in legal character to a criminal purpose aimed against life. Generally the intent must have been to commit either a specific felony, or at least an act involving all the wickedness of a felony. And, if the intent be directly to produce a bodily injury, it must be such an injury as may be expected to involve serious consequences, either periling life, or leading to great bodily harm. There is no rule recognized as authority which will allow a conviction of murder where a fatal result was not intended, unless the injury intended was one of a very serious character which might naturally and commonly involves loss of life or grievous mischief. Every assault involves bodily harm. But any doctrine which would hold every assailant as a murderer where death follows his act, would be barbarous and unreasonable.

The language used in most of the statutes on felonious assaults is, an intent to do "grievous bodily harm." Carr. Sup. p. 237. And even such an assault, though "unlawfully and maliciously" made, is recognized as one where, if death followed, the result would not necessarily have been murder. Id. Our own statutes have made no provision for rendering assaults felonious, unless committed with a dangerous weapon, or with an intent to commit some felony. Comp. Laws, c. 244.

In general, it has been held that where the assault is not committed with a deadly weapon the intent must be clearly felonious, or the death will subject only to the charge of manslaughter.

The presumption arising from the character of the instrument of violence is not conclusive in either way, but, where such weapons are used as do not usually kill, the deadly intent ought to be left in no doubt. There are cases on record where death by beating and kicking has been held to warrant a verdict of murder, the murderous intent being found. But where there was no such intent the ruling has been otherwise. In State v. McNab, 20 N. H. 160, it is held that, unless the unlawful act of violence intended was felonious, the offense was manslaughter. The same doctrine is laid down in State v. Smith, 32 Me. 369. That is the statutory rule in New York and in some other states.

The willful use of a deadly weapon, without excuse or provocation in such a manner as to imperil life, is almost universally

recognized as showing a felonious intent. See 2 Bish. Cr. Law, §§ 680, 681. But, where the weapon or implement used is not one likely to kill or to maim, the killing is held to be manslaughter unless there is an actual intent which shows a felonious purpose. See Turner's Case, 1 Ld. Raym. 144, where a servant was hit on the head with a clog; State v. Jarrott, 1 Ired. 76, where the blow was with a hickory stick; Holly v. State, 10 Humph. 141, where a boy threw a stone; Rex v. Kelley, 1 Moody, Cr. Cas. 113, where it was uncertain whether a person was killed by a blow with the fist, which threw him on a brick, or by a blow from a brick, and the court held it a clear case of manslaughter. In Darry v. People, 10 N. Y. 120, the distinctions are mentioned and relied upon, and in the opinion of Parker, J., there are some remarks very applicable. In the case of Com. v. Webster, 5 Cush. 295, the rulings of which have been regarded as going beyond law, in severity, this question is dealt with in accordance with the same views, and quotations are given from East to the same purport.

The case of death in a prize fight is one of the commonest illustrations of manslaughter, where there is a deliberate arrangement to fight, and where great violence is always to be expected, from the strength of the parties, and the purpose of fighting till one or the other is unable to continue the contest. A duel with deadly weapons renders every killing murder; but a fight without weapons, or with weapons not deadly, leads only to manslaughter, unless death is intended. 1 East, P. C. 270; Murphy's Case, 6 Car. & P. 103; Hargrave's Case, 5 Car. & P. 170.

The case of Com. v. Fox, 7 Gray, 585, is one resembling the present in several respects, in which the offense was held to be manslaughter.

The jury were sufficiently and rightly charged upon the extent of the respondent's liability for any intended killing. And if respondent willfully and violently kicked the deceased in such a way as he must have known would endanger her life, and her life was destroyed in that way, an actual intention of killing would not be necessary, as in such case the death would have been a result he might fairly be held to regard as likely. But it was certainly open to him to claim that, whatever may have been the cause of death, he did nothing which was designed to produce any serious or fatal mischief, and that the injury from

which the deceased came to her death was not intentionally aimed at a vital spot, or one where the consequences would be probably or manifestly dangerous. We have no right to say that there was no room for a verdict of manslaughter, and the effect of the charge was to deny this. * * * .

Degrees of Murder.

HOPT v. PEOPLE.

104 U. S. 631. 1881.

GRAY, J., delivered the opinion of the court.

The plaintiff in error was indicted, convicted, and sentenced for the crime of murder in the first degree in the District Court of the Third Judicial District of the Territory of Utah, and presented a bill of exceptions, which was allowed by the presiding judge, and from his judgment and sentence appealed to the Supreme Court of the Territory, and that court having affirmed the judgment and sentence, he sued out a writ of error from this court. Of the various errors assigned, we have found it necessary to consider two only.

The penal code of Utah contains the following provisions: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life,—is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." § 89. "Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." § 90. Compiled Laws of Utah of 1876, pp. 585, 586.

By the Utah Code of Criminal Procedure, the charge of the judge to the jury at the trial "must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally" (§ 257, C. L. 7); the jury, upon retiring for deliberation, may take with them the written instructions given (§ 289); and "when written charges have been presented, given, or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the endorsements showing the action of the court, form a part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." § 315. Laws of Utah of 1878, pp. 115, 121, 126.

It appears by the bill of exceptions that evidence was introduced at the trial tending to show that the defendant was intoxicated at the time of the alleged homicide.

The defendant's fifth request for instructions, which was endorsed "refused" by the judge, was as follows: "Drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration of or attempt to perpetrate arson, rape, robbery, or burglary. The degree of the offense depends entirely upon the question whether the killing was wilful, deliberate, and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be; not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime."

Upon this subject the judge gave only the following written instruction: "A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the

consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that law has never recognized it as an excuse for crime."

The instruction requested and refused, and the instruction given, being matter of record and subjects of appeal under the provision of the Utah Code of Criminal Procedure, § 315, above quoted, their correctness is clearly open to consideration in this court. Young v. Martin, 8 Wall. 354.

At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence. United States v. Drew, 5 Mass. 28; United States v. McGlue, 1 Curt. 1; Commonwealth v. Hawkins, 3 Gray (Mass.), 463; People v. Rogers, 18 N. Y. 9. But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in the Supreme Judicial Court of Massachusetts in cases tried before a full court, one of which is reported upon other points, (Commonwealth v. Dorsey, 103 Mass. 412); and in well-considered cases in courts of other States. Pirtle v. State, 9 Humph. (Tenn.) 663; Haile v. State, 11 id. 154; Kelly v. Commonwealth, 1 Grant (Pa.), Cas. 484; Keenan v. Commonwealth, 44 Pa. St. 55; Jones v. Commonwealth, 75 id. 403; People v. Belencia, 21 Cal. 544; People v. Williams, 43 id. 344; State v. Johnson, 40 Conn. 136, and 41 id. 584; Pigman v. State of Ohio, 14 Ohio, 555, 557. And the same rule is expressly enacted in the Penal Code of Utah, § 20: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever, the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Compiled Laws of Utah of 1876, pp. 568, 569.

The instruction requested by the defendant clearly and accurately stated the law applicable to the case; and the refusal to give that instruction, taken in connection with the unqualified instruction actually given, necessarily prejudiced him with the jury.

For these reasons, the judgment must be reversed, and the case remanded with instructions to set aside the verdict and order a new trial.

CHAPTER XVII.

VOLUNTARY MANSLAUGHTER.

PEOPLE v. FREEL.

48 Cal. 436. 1874.

The defendant was indicted for the crime of murder, alleged to have been committed at San Francisco, on the first day of November, 1873, by killing one Edward W. Allen. Allen kept a saloon, and a crowd of persons having collected there so as to obstruct his doorway, he went from his place behind the bar with a cane or stick to clear the passageway. A difficulty took place during which he was killed. The defendant claimed to have been justified, but the testimony was of such a character, that it became a question, if he was not justified, whether the offense was murder or manslaughter. The defendant was convicted of murder in the second degree, and appealed.

By the Court, NILES, J.:

The Court instructed the jury as follows: "You will also observe that the difference between murder and manslaughter is, that in manslaughter there is no intention whatever either to kill or to do bodily harm. The killing is the unintentional result of a sudden heat of passion, or of an unlawful act committed without due caution or circumspection."

This is clearly erroneous. Whether the homicide amounts to murder or to manslaughter merely, does not depend upon the presence or absence of the intent to kill. In either case there may be a present intent to kill at the moment of the commission of the act. But when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate

and malicious intent which is an essential element in the crime of murder.

Under the circumstances of this case, as shown by the testimony, it was important that the distinction between the several grades of homicide should be correctly stated to the jury. They could hardly fail to be misled by the erroneous instruction we have noticed.

Several other points were made by the counsel for defendant, which we do not deem necessary to discuss.

Judgment and order reversed, and cause remanded for a new trial.

CHAPTER XVIII.

INVOLUNTARY MANSLAUGHTER.

Elements of the Crime.

REGINA v. KNOCK.

14 Cox Cr. Cas. 1 (Eng.). 1877.

Prisoner was indicted for the manslaughter of Joseph Tipper.

It was proved that the prisoner, being challenged, and attacked by the deceased, who had taken his coat off to fight, also took off his coat and blows of the fists were exchanged. After four or five rounds the deceased received from the prisoner a blow which killed him. The facts are more particularly stated in the summing up.

At the close of the case for prosecution, Mr. Underhill submitted that there was no evidence for the jury. The fatal blow must have been given accidentally in defense.

LINDLEY, J. The case is perhaps on the border line. But, seeing that the men fought four or five rounds, there appears to have been what is called a "set-to." I think, therefore, that under the circumstances, the facts should go to the jury.

Counsel for the prisoner having addressed the jury,

LINDLEY, J., summed up. The prisoner is charged with manslaughter, which means causing the death of another without lawful excuse. If he did so, he is guilty; if he did not, he is not guilty. What, then, is lawful excuse? The difficulty is in drawing the distinction between self-defense and fighting. If two men fight, and one unfortunately kills another, then, they being engaged in an unlawful occupation or business, the killing of either by the other is manslaughter, even if it be by accident, and is a crime in point of law, although the crime varies in degree of gravity. But, on the other hand, if a man attacks me, I am entitled to defend myself, and the difficulty arises in drawing the line between mere self-defense and fighting. The test is

this: a man defending himself does not want to fight, and defends himself solely to avoid fighting. Then, supposing a man attacks me and I defend myself, not intending or desiring to fight, but still fighting—in one sense—to defend myself, and I knock him down and thereby unintentionally kill him, that killing is accidental. It is for you to draw the line. The facts up to a certain point are not disputed. No doubt the deceased came to his death in the course of a struggle with the prisoner, and was knocked down by the prisoner, and by reason of being so knocked down died; *prima facie,* that is unlawful killing. Next, let us consider whether the men were fighting in the sense I have defined, or whether the prisoner was desiring not to fight. The evidence clearly shows that it was the defendant who provoked this, and it was sworn that not only was a challenge to fight given —not only did they go out, but both had their jackets off. A fact in favor of the prisoner is that he was reluctant indoors to fight, and expressed the same reluctance out of doors. But they had four or five rounds. That is a circumstance which tends to show that these persons were really fighting as distinguished from mere resistance in self-defense. If you think the prisoner was doing what was lawful, simply defending himself, find him not guilty; but if he was fighting then he was doing what was unlawful, and your verdict should be against him.

STATE v. HARDIE.

47 Iowa 647. 1878.

The defendant was indicted for murder in the second degree. He was convicted of the crime of manslaughter, and sentenced to the penitentiary for one year. The facts of the case appear in the opinion.

ROTHROCK, C. J. It appears from the evidence that the defendant was a boarder in the family of one Gantz, who is his brother-in-law. On the day of the homicide defendant was engaged in varnishing furniture. Mrs. Sutfen, a neighbor, called at the house, and after some friendly conversation she went into the kitchen. When she came back defendant picked up a tack hammer and struck on the door. She said, "My God, I thought

it was a revolver." A short time afterwards she went into the yard to get a kitten. Defendant said he would frighten her with the revolver as she came in. He took a revolver from a stand drawer and went out of the room, and was in the kitchen when the revolver was discharged. He immediately came in and said to Mrs. Gantz, his sister, "My God, Hannah, come and see what I have done." His sister went out and found Mrs. Sutfen lying on the sidewalk at the side of the house, with a gunshot wound in the head, and in a dying condition. A physician was immediately called and made an examination of the deceased, took the revolver from the defendant, and informed him that nothing could be done for the deceased, whereupon the defendant became violent, said the shot was accidental, and exclaimed several times that he would kill himself. It became necessary to secure him, which was done by tying him with ropes.

The revolver had been in the house for about five years. It was found by Gantz in the road. There was one load in it when found. Some six months after it was found Gantz tried to shoot the load from it and it would not go off. He tried to punch the load out, but could not move it. He then laid it away, thinking it was harmless. The defendant was about the house and knew the condition of the revolver. Upon one occasion Gantz said he would try to kill a cat with the revolver. Defendant being present said he would not be afraid to allow it to be snapped at him all day. The revolver remained in the same condition that it was when found, no other load having been put into it, and it was considered by the family as well as defendant as entirely harmless.

The foregoing is the substance of all the evidence.

The State did not claim that the defendant was guilty of murder, but that he was guilty of manslaughter because of criminal carelessness. The defendant insisted that there was no such carelessness as to render the act criminal, and that it was homicide by misadventure, and therefore excusable.

The court instructed the jury as follows: "5. And on the charge of manslaughter, I instruct you that if the defendant used a deadly and dangerous weapon, in a careless and reckless manner, by reason of which instrument so used he killed the deceased, then he is guilty of manslaughter, although no harm was in fact intended."

Other instructions of like import were given, and the question of criminal carelessness was submitted to the jury, as follows: "8th. And in this case I submit to you to find the facts of recklessness and carelessness under the evidence, and if you find that the death of the party was occasioned through recklessness and carelessness of the defendant then you should convict him, and if not you should acquit. And by this I do not mean that defendant is to be held to the highest degree of care and prudence in handling a dangerous and deadly weapon, but only such care as a reasonably prudent man should and ought to use under like circumstances, and if he did not use such care he should be convicted, otherwise he should be acquitted."

There can be no doubt that the instructions given by the court embody the correct rule as to criminal carelessness in the use of a deadly weapon. Counsel for defendant insist that the instructions of the court do not go far enough, and upon the trial asked that the court give to the jury the following instruction:

"3. Although the deceased came to her death from the discharge of a pistol in the hands of the defendant, yet if the defendant had good reason to believe, and did believe, that the pistol which caused her death was not in any manner dangerous, but was entirely harmless, and if he did nothing more than a man of ordinary prudence and caution might have done under like circumstances, then the jury should find him not criminally liable and should acquit."

This instruction and others of like import were refused by the court, and we think the ruling was correct. That the revolver was in fact a deadly weapon is conclusively shown by the terrible tragedy consequent upon defendant's act in firing it off. If it had been in fact unloaded no homicide would have resulted, but the defendant would have been justly censurable for a most reckless and imprudent act in frightening a woman by pretending that it was loaded, and that he was about to discharge it at her. No jury would be warranted in finding that men of ordinary prudence so conduct themselves. On the contrary, such conduct is grossly reckless and reprehensible, and without palliation or excuse. Human life is not to be sported with by the use of firearms, even though the person using them may have good reason to believe that the weapon used is not loaded, or that being loaded it will do no injury. When persons engage in such reck-

less sport they should be held liable for the consequences of their acts.

It is argued that the evidence does not show the defendant guilty of criminal carelessness, because it does not appear that the defendant pointed the pistol at the deceased, or how it happened to be discharged. The fact that defendant took the weapon from the drawer with the avowed purpose of frightening the deceased, and while in his hands it was discharged with fatal effect, together with his admission that he did the act, fully warranted the jury in finding that he purposely pointed the pistol and discharged it at the deceased. Affirmed.

Killing Through Neglect of Legal Duty.

STATE v. O'BRIEN.

32 N. J. Law 169. 1867.

DALRIMPLE, J. On the fifteenth day of November, 1865, the defendant was a switch-tender, in the employ of the New Jersey Railroad and Transportation Company. His duty was to adjust, and keep adjusted, the switches of the road at a certain point in the city of Newark, so that passenger trains running over the road would continue on the main track thereof, and pass thence to the city of Elizabeth. He failed to perform such duty, whereby a passenger train of cars, drawn by a locomotive engine, was unavoidably diverted from the main track to a side track, and thence thrown upon the ground. The cars were thrown upon each other with great force and violence, by means whereof one Henry Gardner, a passenger upon the train, was so injured that he died. The defendant was indicted for manslaughter, and convicted upon trial in the Essex Oyer and Terminer. He insisted and in different forms, asked the court to charge the jury, that he could not legally be convicted, unless his will concurred in his omission of duty; the court refused so to charge. A rule to show cause why the verdict should not be set aside was granted, and the case certified into this court for its advisory opinion, as to whether there was any error in the charge of the court below, or in the refusal to charge, as requested.

The indictment was for the crime of manslaughter. If the

defendant's omission of duty was wilful, or in other words, if his will concurred in his negligence, he was guilty of murder. Intent to take life, either by an act of omission or commission, distinguishes murder from manslaughter. In order to make out against the defendant the lesser offense of manslaughter, it was not necessary that it should appear that the act of omission was wilful or of purpose. The court was right in its refusal to charge as requested.

The only other question is, whether there is error in the charge delivered. The error complained of is, that the jury were instructed that a mere act of omission might be so criminal or culpable as to be the subject of an indictment for manslaughter. Such, we believe, is the prevailing current of authority. Professor Greenleaf, in the third volume of his work on Evidence, § 129, in treatment of homicide, says: "It may be laid down, that where one, by his negligence, has contributed to the death of another, he is responsible. The caution which the law requires in all these cases, is not the utmost degree which can possibly be used, but such reasonable care as is used in the like cases, and has been found, by long experience, to answer the end." Wharton in his Treatise on Criminal Law, p. 382, says: "There are many cases in which death is the result of an occurrence, in itself unexpected, but which arose from negligence or inattention. How far in such cases the agent of such misfortune is to be held responsible, depends upon the inquiry, whether he was guilty of gross negligence at the time. Inferences of guilt are not to be drawn from remote causes, and the degree of caution requisite to bring the case within the limits of misadventure, must be proportioned to the probability of danger attending the act immediately conducive to the death." The propositions so well stated by the eminent writers referred to, we believe to be entirely sound, and are applicable to the case before us. The charge, in the respect complained of, was in accordance with them. It expressly states, that it was a question of fact for the jury to settle, whether the defendant was or was not guilty of negligence; whether his conduct evinced under the circumstances such care and diligence as were proportionate to the danger to life impending. The very definition of crime is an act omitted or committed in violation of public law. The defendant in this case omitted his duty under such circumstances as amounted to gross

or culpable or criminal negligence. The court charged the jury, that if the defendant, at the time of the accident, was intending to do his duty, but in a moment of forgetfulness omitted something which any one of reasonable care would be likely to omit, he was not guilty. The verdict of guilty finds the question of fact involved in this proposition against the defendant, and convicts him of gross negligence. He owed a personal duty not only to his employers, but to the public. He was found to have been grossly negligent in the performance of that duty, whereby human life was sacrificed. His conviction was right, and the court below should be so advised.

CHAPTERS XIX-XXI.

LARCENY.

The Taking and Carrying Away.

STATE v. ALEXANDER.

74 N. C. 232. 1876.

BYNUM, J. The defendant was indicted for stealing a hog running at large in the "range." The hog was found dead, having been shot. Its ears had been cut off, and one of its hams skinned, but the skin had not been severed from the animal, no part being cut off except the ears. There was no evidence that the hog had been killed elsewhere than where found, or had been removed from the spot where it had been killed. There was evidence that the defendant shot the hog and did the skinning. His Honor charged the jury, that if the defendant shot and skinned the hog, as alleged, and had it under his control, with the intent to steal, there was in law a sufficient asportation, and he was guilty. There is error.

To complete the crime of larceny, it is not sufficient that the defendant had the control of the article, that is, had the power to remove it, but there must be an asportation of the thing alleged to have been stolen. It is true, a very slight asportation will be deemed sufficient, yet there must be some removal to complete the offense. The case here shows that there was no removal of the hog, but that it remained *in situ,* as it had been shot down. In the State v. Jones, 65 N. C., 395, it was held that the turning of a barrel of turpentine, which was standing upon its head, over upon its side, with a felonious intent, was not such an asportation as constituted larceny. So in the State v. Butler, 65 N. C., 309, which is a case almost identical with this, it was held, that an indictment at common law, for stealing a cow, is not supported by proof that the cow was shot down and her ears cut off by the defendant with a felonious intent, because there

was no asportation of the cow, the thing charged to have been stolen. These cases and others of our own, as well as English, are decisive. State v. Jackson, 65 N. C., 305; Roscoe, 570, 2 Bish. Cr. Law, 804; 2 East, P. C., 556.

Per Curiam: Judgment reversed.

Possession of the Goods.

REX v. BULL.

2 Leach 841 (Eng.). 1797.

The prisoner, Thomas Bull, was tried at the Old Bailey, January Session, 1797, before Mr. Justice Heath, on an indictment charging him with having stolen, on the 7th of the same month, a half crown and three shillings, the property of William Tilt, who was a confectioner in Cheapside, with whom the prisoner lived as a journeyman; and Mr. Tilt having had, for some time before, strong suspicion that the prisoner had robbed him, adopted the following method for the purpose of detecting him: On the 7th of January, the day laid in the indictment, he left only four sixpences in the till; and, taking two half-crowns, thirteen shillings, and two sixpences, went to the house of Mr. Garner, a watchmaker, who marked the two half-crowns, several of the shillings and the sixpences with a tool used in his line of business, that impressed a figure something like a half-moon. Mr. Tilt having got the money thus marked, went into the house of a Mrs. Hill, and giving a half-crown and three of the shillings to Ann Wilson, one of her servants, and five of the shillings and the other sixpence to Mary Bushman, another of her servants, desired them to proceed to his house and purchase some of his goods of the prisoner, whom he had left in care of the shop. The two women went, accordingly, to Mr. Tilt's shop, where Ann Wilson purchased confectionery of the prisoner to the amount of five shillings and three-pence, gave him the half-crown and three shillings, and received threepence in change; and Mary Bushman purchased of him articles to the amount of four shillings and sixpence, for which she paid him out of the moneys she had so received, and returned the other shilling to her mistress, Mary Hill. But neither of these women observed whether the prisoner put either the whole or any part of the money into the till or into

his pocket. While the women, however, were purchasing these things, Mr. Tilt and Mr. Garner were waiting with a constable at a convenient distance on the outside of the shop door; and, when they observed the women come out, they went immediately into the shop, where, on examining the prisoner's pockets, they found among the silver coin, amounting to fifty-three shillings, which he had in his waistcoat pocket, the marked half-crowns and three of the marked shillings which had been given to Wilson and Bushman; only seven shillings and sixpence were found in the till; and it appeared that Mrs. Tilt had taken one shilling in the shop and put it into the till during her husband's absence, so that the two shillings which had been left therein in the morning, the one shilling which Mrs. Tilt had put into it, the four shillings and sixpence laid out by Mary Bushman and the five shillings and sixpence marked money which was found in the prisoner's pocket made up the sum which ought to have been put into the till. The prisoner, upon this evidence, was found guilty and received sentence of transportation. But a case was reserved for the opinion of the twelve judges: whether, as Mr. Tilt had divested himself of this money by giving it to Mary Hill, who had given it to her servants in the manner and for the purpose above described, and as it did not appear that the prisoner had, on receiving it from them, put it into the till or done anything with it that could be construed a restoring it to the possession of his master, the converting of it to his own use by putting it into his own pocket could amount to the crime of larceny, it being essential to the commission of that offence that the goods should be taken from the *possession* of the owner; and, although no opinion was ever publicly delivered upon this case, the prisoner was discharged.

REGINA v. REED.

6 Cox C. C. 134 (Eng.). 1854.

The following case was reserved by the Court of Quarter Sessions for the county of Kent:

At the General Quarter Sessions of the Peace for the county of Kent, holden at Maidstone, on the 4th of January, 1853, before Aretus Akers, Edward Burton, and James Espinasse, Esqrs., justices appointed to try prisoners in a separate court, Abraham

Reed was tried upon an indictment for feloniously stealing 200 pounds weight of coals, the property of William Newton, his master, on the 6th of December, 1852; and James Peerless was charged in the same indictment with receiving the coals, knowing the same to have been stolen, and was acquitted.

The evidence of the prosecutor, William Newton, was as follows: "I am a grocer and miller, at Cowden, and sell coals by retail. The prisoner, Reed, entered my service last year, about three weeks before the 6th of December. On that day I gave him directions to go to a customer to take some flour, and thence to the station at Edenbridge, for 12 cwt. of coals. I deal with the Medway Company, who have a wharf there, Holman being wharfinger. I told Reed to bring the coals to my house. Peerless lives about 500 yards out of the road from the station to my house. Reed went about nine a. m., and ought to have come back between three and four p. m.; but as he had not come back, I went in search of him at half-past six, and found him at Peerless's. The cart was standing in the road opposite the house, and the two prisoners were taking coals from the cart in a truck basket. It was dark. I asked Reed what business he had there, he said, 'to deliver half a hundredweight for which he had received an order from Peerless.' Reed had never before told me of such an order, and had no authority from me to sell coals. Later that evening I went and asked Peerless what coals he had received from my cart, he said, half a hundredweight. I then asked him how they were carried from the cart: he said, in a sack. I weighed the coals when brought home, and found the quantity so brought a quarter of a hundredweight and four pounds short. I went to Peerless's next day and found some coals there, apparently from half to three quarters of a hundredweight." * * *

LORD CAMPBELL, C. J. There lies before me a judgment that I had prepared for myself at a time when there was reason to suppose that there might be one, if not more dissenting judges. I have reason to believe now that there will not be any dissent; but still this judgment must be considered only as embodying the reasons I give for my opinion, because I have no authority to say that my brothers concur in that opinion, and the reasons for it. For convenience, I have written my judgment, and my

learned brothers will say how far they concur or dissent. I am of opinion that the prisoner has been properly convicted of larceny. There can be no doubt that, in such a case, the goods must have been in the actual or the constructive possession of the master; and that, if the master had not otherwise the possession of them than by the bare receipt of his servant upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet in respect of the servant himself this will not support a charge of larceny, because as to him there was no tortious taking in the first instance, and consequently no trespass. Therefore, if there had been a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner, having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having been done to determine his original exclusive possession, had converted them animo furandi, he would have been guilty of embezzlement, and not of larceny. But if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them animo furandi, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We have therefore to consider whether the exclusive possession of the coals continued with the prisoner down to the time of the conversion. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart, in the same manner as if they had been deposited in the prosecutor's cellar, of which the prisoner had the charge. The prosecutor was undoubtedly in possession of the cart at the time when the coals were deposited in it; and if the prisoner had carried off the cart animo furandi, he would have been guilty of larceny. That is expressly determined in Robinson's case, 2 East, 565. There seems considerable difficulty in contending that, if the master was in possession of the cart, he was not in possession of the coals which it contained, the coals being his property, and deposited there by his order, for his use. Mr. Ribton argued that the goods received by a servant for his master remain in the exclusive possession of the servant till they have reached their ulti-

mate destination. But he was unable, notwithstanding his learning and ingenuity, to give any definition of "ultimate destination," when so used. He admitted that the master's constructive possession would begin before the coals were deposited in the cellar, when the cart containing the coals had stopped at his door, and even when it had entered his gate. But I consider the point of time to be regarded is that when the coals were deposited in the cart. Thenceforth the prisoner had only the custody or charge of the coals, as a butler has of his master's plate, or a groom has of his master's horse. To this conclusion, with the most sincere deference to any of my learned brothers who may at any time have taken a different view—to this conclusion I should have come on principle.

* * * * * * * * * *

It is said there is great subtlety in giving such an effect to the deposit of the coals in the prosecutor's cart; but the objection rests on a subtlety wholly unconnected with the moral guilt of the prisoner, for as to that it must be quite immaterial whether the property in the coals had or had not vested in the prosecutor prior to the time when they were delivered to the prisoner. We are to determine whether this would have been a case of larceny at common law before there was any statute against embezzlement; and I do not think that there would have been any reproach to the administration of justice, in holding that the subtlety arising from the prosecutor having had no property in the subject of the larceny before its delivery to the prisoner, who stole it, was sufficiently answered by the subtlety that when the prisoner had once parted with the personal possession of it, so that a constructive possession by the prosecutor began, the servant who subsequently stole it should be liable to be punished, as if there had been a prior property and possession in the prosecutor, and that the servant should be adjudged liable to be punished for a crime, instead of being allowed to say that he had only committed a breach of trust, for which he might be sued in a civil action. In approaching the confines of different offenses created by common law or by statute, nice distinctions must arise, and must be dealt with. In the present case it is satisfactory to think that the ends of justice are effectually gained by affirming the conviction; for the only objection to it is founded upon an argument that he ought to have been con-

victed of another offense of the same character, for which he would have been liable to the same punishment.

Conviction affirmed.

Continuing Trespass.

COMMONWEALTH v. WHITE.

65 Mass. 483. 1853.

Indictment for larceny from a stable, of a horse, wagon, and harness, alleged to have been committed in the county of Bristol. The stable was situated in Easton, in that county, and the property belonged to John McDonald. At the trial in the court of common pleas, before Wells, C. J., the evidence tended to prove that said property was in the stable of the owner, who was absent. The said James White represented to Josiah White, Jr., the other defendant, that he had hired the horse and wagon of the owner, and invited him to go to North Bridgewater. They harnessed the horse about 5 o'clock p. m. and started and met the owner. He called to them to stop, but they passed on without heeding him. They went to North Bridgewater, and stayed there till evening, when they started on their way back. The horse becoming disabled by a fall, they unharnessed him, turned him loose, and took another horse from a pasture near the road, and harnessed him into the wagon, and proceeded into Easton on the road towards the stable of the owner. While riding along in the town of Easton, James White proposed to Josiah to go to Brighton, in the county of Middlesex. Josiah consented, and they, while in the town of Easton, turned from the road leading to the stable of McDonald, and drove to Brighton. And there Josiah, under the instruction and direction of James, put the property into the hands of an auctioneer, stating that his name was Johnson, and that the horse belonged to his father, who had given him leave to sell him. The auctioneer sold the same, but something happening to excite his suspicions, he refused to pay over the money. McDonald testified that he did not let the horse, wagon, and harness, or either of them to James White, nor had he ever let to him any horse, wagon, or harness, but that he had sometimes, but not on this occasion, let to Josiah White, Sen., the wagon and harness, but never that horse; that he did

not use any force to stop defendants, when he met them, because it would have been very inconvenient for him to have got off from his load, and that he expected they would return the horse and wagon.

The counsel for the defendant contended: 1. That if the property was let to James White and Josiah White, Jr., there was no larceny. 2. That if the defendant took the property without leave, although the taking was a trespass, but if he intended, when he took it, to return it, there was no larceny, although, while on the way, he should determine to appropriate the property, and should proceed to do with it as appeared from the testimony. 3. That there was no evidence of such a conversion of the property as would amount to the crime of larceny, if the property was taken without leave, but with the intention at the time of returning it.

But the court instructed the jury, that if the taking was a trespass, and if the trespasser, at the time of taking, intended to appropriate the property to his own use, the taking would be a larceny of the entire property. If the taking was a trespass, but the defendant intended at the time of taking to return the property, and this intention continued until after the shifting of the horses, there was no larceny of the horse. But if afterwards and before proposing to go to Brighton, the defendant determined to take the property to Brighton and there dispose of it as his own, and he did in pursuance of that determination do that which was stated in the testimony this would amount to larceny of the wagon and harness.

The jury found the defendant guilty of simple larceny of the wagon and harness, and not guilty of the residue of the charge in the indictment, and to these instructions the defendant excepted.

MERRICK, J. There appears to be no legal objection to the conviction of the defendant. The questions of fact which arose upon the trial were submitted to the jury, under suitable and accurate instructions in matters of law. The wrongful taking of goods by a party with an intent to assume them as his own, or to convert them to his own use, is a trespass merely. And in many cases the subsequent fraudulent appropriation and conversion of goods, the possession of which has been rightfully obtained, does not constitute a felony. Rosc. Crim. Ev. 472,

478; Archb. Crim. Pl. 186. But if a person by committing a trespass has tortiously and unlawfully acquired possession of personal property belonging to another, and afterwards conceives the purpose of fraudulently depriving the owner of it, and in pursuance of that design, with a felonious intent, carries it away and converts it to his own use, he thereby commits and is guilty of the crime of larceny. 1 Hale P. C. 507; 2 East P. C. 662; Regina v. Riley, 1 Dears. C. C. 149. This is the effect and substance of the explanation and statement of the law, made by the presiding judge upon the trial. While the defendant was on his way to North Bridgewater, and also during the time of his return, until he fraudulently determined to appropriate and convert the horse to his own use, and until he did some act in execution of that purpose, he was only a trespasser; but he made himself a thief as soon as he drove or led away the horse, or made any disposition of him, with such a felonious intent. This, indeed, is not strenuously denied by his counsel, who relies, in the defense, much more upon the objection, that no larceny was committed before the arrival of the defendant at Brighton in the county of Middlesex. But it is clear that the crime had been fully committed at an earlier period. The jury must have found, under the direction of the court, that the defendant formed the determination to take the property to Brighton and there dispose of it as his own, before "the horses were shifted;" and that he drove on in execution of that design until the horse became "disabled by a fall." Here, then, while the defendant was still in the county of Bristol, are developed the existence of all the elements of the crime of larceny; the unlawful taking, the felonious intent, and the fraudulent conversion of the property to his own use. Upon such proof, a conviction was inevitable, and the verdict against the defendant must therefore be affirmed.

Exceptions overruled.

Larceny by Bailee.

REGINA v. THOMAS.

9 C. & P. 741 (Eng.). 1841.

Larceny. The prisoner was indicted for stealing a sovereign, the property of Thomas Hins.

It appeared that the prosecutor and the prisoner, having entered a beer shop, were drinking together, and that the prosecutor who had agreed to treat the prisoner, took a sovereign out of his pocket for the purpose of paying and offered it to the landlady to change, and upon her declaring her inability to do so she placed it on the table, and the prisoner said, "I'll go and get change." The prosecutor said, "You won't come back with the change," to which the prisoner replied, "Never fear," and taking up the sovereign left the house, and did not again return. It appeared from the evidence of the prosecutor that he was not aware of the last remark of the prisoner, nor, at first, that he had gone out with the sovereign, but he had not offered any opposition to the prisoner's taking it, having left the sovereign on the table after his reply to the prisoner's offer.

Streeten, for the prisoner, submitted, that the intention of the prisoner was clearly to be collected from the evidence, and that as it appeared that the taking was with intent to get change, any subsequent felonious intent of converting it to his own use would not constitute a trespass sufficient to render it a felony; and that the prosecutor having parted with the legal possession of the sovereign, the subsequent appropriation of the money by the prisoner did not amount to larceny.

Huddleston, for the prosecution, submitted, that it did not appear by the evidence that the prosecutor had consented to the taking of the sovereign.

COLERIDGE, J. I think that the passive conduct of the prosecutor amounted to a sufficient sanction of the taking.

Huddleston. I submit that the prosecutor had not divested himself of the property in the sovereign by even giving it to the prisoner for change, and that it remained his till it was actually changed.

Coleridge, (having conferred with Gurney, B). It appears quite clear that the prosecutor having permitted the sovereign to be taken away for change, could never have expected to receive back again the specific coin, and he had therefore divested himself, at the time of the taking, of the entire possession in the sovereign, and consequently, I think, that there was not a sufficient trespass to constitute a larceny.

Verdict—Not guilty.

REX v. PATCH.

1 Leach C. C. (4th ed.) 238 (Eng.). 1782.

At the Old Bailey in February Session, 1782, John Patch was indicted before Mr. Justice Gould, present Mr. Baron Perryn, and Mr. Justice Buller, for stealing a silver watch, a steel chain, a gold seal, two pieces of foreign coin, and seven shillings in money, the property of Jeremiah Bumstead.

The prosecutor deposed, that the prisoner and two other persons who made their escape, had joined company with him in the street, and after walking a short space with him one of them stooped down and picked up a purse, which upon inspection was found to contain a ring, and a receipt for £147 purporting to be the receipt of a jeweler for "a rich brilliant diamond ring." The prisoner proposed that they should go into some public-house, to consider in what manner their respective portions of this prize should be divided, and accordingly they all four of them went into an ale-house on Saffron Hill. Various modes of distribution were suggested; at length the prisoner asked the prosecutor if it would be agreeable to him to take the ring into his own possession, and to deposit his money and his watch as a security to return it upon receiving his portion of its value. The prosecutor assented to the proposal; and signed a written agreement, dictated by the prisoner, "That when the prisoner, or either of the other two men, returned the watch and money, and seventy pounds, he would re-deliver to them the purse and the ring." The prosecutor accordingly laid the watch and money mentioned in the indictment upon the table, and received the ring. The prisoner beckoned the prosecutor out of the room, upon a pretense of speaking to him in private; and during this interval the other two men marched off with the property. The abrupt manner in which they went away made the prosecutor conceive that he had been defrauded, but the prisoner told him not to be uneasy, for he knew the two men very well, and would take care that he should have his money and watch again; but he secured the prisoner, who then made proposals to him to make the matter up. The ring was valued at ten shillings.

It was objected by the prisoner's counsel, that as the prose-

cutor had parted voluntarily with his property, it was a fraud only, and not a felony; but the court, upon the authority of the case of The King v. Pear, referred it to the jury to consider,—Whether the whole transaction was not an artful and preconcerted scheme in the three men, feloniously to obtain the prosecutor's watch and money? And whether the prisoner and the other two men were not all in concert together to procure by such a pretext any man's money whom they might meet, and to embezzle it, or, in other ways to steal it.

The jury found the prisoner guilty; and he was sentenced to raise gravel three years on the River Thames.

When Owner Parts with Title.

REX v. MOORE.

Leach C. C. (4th ed.) 314 (Eng.). 1784.

This was a case reserved for the opinion of the twelve judges by Mr. Sergeant Adair, Recorder, at the Old Bailey, in April Session, 1784, upon the trial of an indictment for stealing twenty guineas, and four pieces of foreign gold coin called doubloons, the property of John Field, in the dwelling-house of John Brown.

The material circumstances of this case, as they appeared in evidence, were as follows: The prosecutor, John Field, a soldier, just returned from the war in America, was walking along James Street, Covent Garden, when a stranger joined company with him. As they walked in friendly conversation with each other down Long Acre, the stranger suddenly stopped and picked up a purse which was lying at a door. After they had proceeded about forty yards, "Come," says the stranger, "we will go and drink a pot of porter, and see what we have picked up." The prosecutor was persuaded to comply; and they accordingly went into a private room in an adjacent public house, where the stranger pulled out the purse and from one end of it produced a receipt, signed "W. Smith," for £210 "for one brilliant diamond-cluster ring," and from the other end he pulled out the ring itself. A conversation ensued upon the subject of their good fortune, during which time the prisoner, Humphrey Moore, entered the room; and being shown the ring,

he praised the beauty of its lustre, and offered to settle the division of its value. Upon the stranger's lamenting that he had no money about him, the prisoner asked the prosecutor if he had any. The prosecutor replied that he had forty or fifty pounds at home." "That sum will just do," said the prisoner. A coach was immediately called, and all three were driven to the prosecutor's lodgings at Chelsea. The prosecutor and the stranger went into the house together, leaving the prisoner at the Five Fields. The prosecutor took his money from his bureau, put it into his pocket, and returned with the stranger to a public house in the Five Fields, Chelsea, kept by John Brown, where they again met the prisoner, who said, "I will give you your share of the ring, if you will be content till to-morrow." The prosecutor put down twenty guineas and four doubloons, which the stranger took up, and in return gave the prosecutor the ring, desiring that he would meet him at the same place on the next morning at nine o'clock, and promising that he would then return the twenty guineas and the four doubloons to the prosecutor, and also one hundred guineas for his share of the ring. The prisoner and the stranger went away together. The prosecutor attended the next morning pursuant to the appointment, but neither of the parties came. The ring was of a very trifling value.

It was left with the jury to consider whether the prisoner and the other man were not confederated together, for the purpose of obtaining money on pretense of sharing the value of the ring, and whether he had not aided and assisted the other man to obtain the money by the means that were used for that purpose. And the jury were of the opinion that the prisoner was confederating with the person unknown for the purpose of obtaining the money by means of the ring, and did therefore aid and assist the person unknown in obtaining the twenty guineas and the four doubloons from the prosecutor. They accordingly found him guilty of stealing, but not in the dwelling-house, subject to the opinion of the twelve judges whether it was felony.

On the first day of Michaelmas Term, 1784, all the judges, except Lord Mansfield, assembled at Lord Loughborough's chambers to consult upon this case; and in the December Session following, Mr. Justice Willes delivered their opinion at the Old Bailey to the following effect: all the judges agreed that in con-

sidering the nature of larceny it was necessary to attend to the distinction between the parting with the possession only, and the parting with the property; that in the first case it is felony, and in the last case it is not. Upon the circumstances of the present case two of the judges were of opinion that the doubloons were to be considered as money, and that the whole was a loan on the security of the ring, which the prosecutor believed to be of much greater value than the money he advanced on it, and therefore that he had voluntarily parted with the property as well as with the possession of the doubloons. But nine of the judges were clearly of opinion that it was felony, for they thought the twenty guineas and the four doubloons were deposited in the nature of a pledge till the half of the supposed value of the ring was paid to the prosecutor, and not as a loan; and therefore he had parted with the possession only, and not with the property,—more especially as to the doubloons, which he clearly understood were to be returned the next day in specie; and they could not distinguish this case from The King v. Patch in this court in February Session, 1782, and the King v. Pear, in September Session, 1779. The majority of the judges, therefore, were of opinion that this case had been properly left to the jury, and that the prisoner was guilty of felony.

The prisoner was accordingly transported.

Larceny of Lost Goods.

REGINA v. THURBORN.

1 Denison C. C. 387 (Eng.). 1849.

The prisoner was tried before Parke, B., at the summer assizes for Huntingdon, 1848, for stealing a bank note.

He found the note, which had been accidentally dropped on the high road. There was no name or mark on it, indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use, when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally;

he then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe it to be the prosecutor's property, before he thus changed the note.

The learned Baron directed a verdict of guilty, intimating that he should reserve the case for further consideration. Upon conferring with Maule, J., the learned Baron was of opinion that the original taking was not felonious, and that in the subsequent disposal of it, there was no taking, and he therefore declined to pass sentence, and ordered the prisoner to be discharged, on entering into his own recognizance to appear when called upon.

On the 30th of April, A. D. 1849, the following judgment was read by Parke, B.:

A case was reserved by Parke, B., at the last Huntingdon assizes. It was not argued by counsel, but the Judges who attended the sitting of the Court after Michaelmas Term, 1848, namely, the L. C. Baron, Patteson, J., Rolfe, B., Cresswell, J., Williams, J., Coltman, J., and Parke, B., gave it much consideration on account of its importance, and the frequency of the occurrence of cases in some degree similar, in the administration of the criminal law, and the somewhat obscure state of the authorities upon it. [The learned Baron here stated the case.]

In the present case there is no doubt that the bank note was lost, the owner did not know where to find it, the prisoner reasonably believed it to be lost, he had no reason to know to whom it belonged, and therefore though he took it with the intent not of taking a partial or temporary, but the entire dominion over it, the act of taking did not, in our opinion, constitute the crime of larceny. Whether the subsequent appropriation of it to his own use by changing it, with the knowledge at that time that it belonged to the prosecutor, does amount to that crime, will be afterwards considered.

It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or there is any mark upon them, presumably known by him, by which the owner can be ascertained. Whether this is a qualification introduced in modern times or which always existed, we need not determine. It may have

proceeded on the construction of the reason of the old rule Quia Dominus rerum non apparet ideo cujus sunt incertum est, and the rule is held not to apply when it is certain who is the owner; but the authorities are many and we believe this qualification has been generally adopted in practice, and we must therefore consider it to be the established law. There are many reported cases on this subject. Some where the owner of goods may be presumed to be known, from the circumstances under which they are found; amongst these are included the cases of articles left in hackney coaches by passengers, which the coachman appropriates to his own use, or a pocketbook, found in a coat sent to a tailor to be repaired, and abstracted and opened by him. In these cases the appropriation has been held to be larceny. Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict. Some cases appear to have been decided on the ground of bailment determined by breaking bulk, which would constitute a trespass, as Wynne's case, Leach, C. C., p. 460, but it seems difficult to apply that doctrine which belongs to bailment, where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding.

The appropriation of goods by the finder has also been held to be larceny where the owner could be found out by some mark on them, as in the case of lost notes, checks or bills with the owner's name upon them.

This subject was considered in the case of Merry v. Green, 7 M. & W., 623, in which the Court of Exchequer acted upon the authority of these decisions; and in the argument in that case difficulties were suggested, whether the crime of larceny could be committed in the case of a marked article, a check, for instance, with the name of the owner on it, where a person originally took it up, intending to look at it, and see who was the owner, and then as soon as he knew whose it was, took it, animo furandi; as in order to constitute a larceny, the taking must be a trespass, and it was asked when in such a case the trespass was committed? In answer to that inquiry the dictum attributed to me in the Report was used; that in such a case the trespass must be

taken to have been committed, not when he took it up to look at it and see whose it was, but afterwards, when he appropriated it to his own use, animo furandi.

It is quite a mistake to suppose, as Mr. Greaves has done, (vol. 2, c. 14), that I meant to lay down the proposition in the general terms contained in the extract from the Report of the case in 7 M. & W., which, taken alone, seems to be applicable to every case of finding unmarked, as well as marked property. It was meant to apply to the latter only.

The result of these authorities is, that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with the intent to take the entire dominion over them, really believing when he takes them, that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.

In applying this rule, as, indeed, in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination.

It would probably be presumed that the taker would examine the chattel as an honest man ought to do, at the time of taking it, and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, animo furandi. The mere taking it up to look at it, would not be a taking possession of the chattel.

To apply these rules to the present case; the first taking did not amount to larceny, because the note was really lost, and there was no mark on it or other circumstances to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note or otherwise disposed of it

before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note, the owner became known to him, and he then appropriated it, animo furandi, and the point to be decided is whether that was a felony.

Upon this question we have felt considerable doubt.

If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not, it was dispunishable, as we have already decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not, therefore, a trespass in this case more than the others, and consequently, no larceny.

We, therefore, think that the conviction was wrong.

Intent in Larceny.

REGINA v. HALL.

3 Cox C. C. 245 (Eng.). 1849.

The following case was reserved by the Recorder of Hull:—

John Hall was tried at the last Epiphany Quarter Sessions for the borough of Hull on an indictment charging him with stealing fat and tallow, the property of John Atkin.

John Atkin, the prosecutor, is a tallow-chandler, and the prisoner at the time of the alleged offense was a servant in his employment. On the morning of the 6th of December last, the prosecutor, in consequence of something that had occurred to excite his suspicions, marked a quantity of butcher's fat, which was deposited in a room immediately above the candle-room in his warehouse. In the latter room was a pair of scales used in weighing the fat, which the prosecutor bought for the purposes of his trade. At noon the foreman and the prisoner left the warehouse to go to dinner, when the former locked the doors

and carried the keys to the prosecutor. At that time there was no fat in the scales. In about ten minutes the prisoner came back and asked for the keys, which the prosecutor let him have. The prosecutor watched him into the warehouse and saw that he took nothing in with him. In a short time he returned the keys to the prosecutor and went away. The prosecutor then went into the candle-room and found that all the fat which he had marked had been removed from the upper room, and after having been put into a bag had been placed in the scales in the candle-room. The prosecutor then went into the street and waited until a man of the name of Wilson came up, who was shortly followed by the prisoner. The latter on being asked where the fat came from that was in the scales, said it belonged to a butcher of the name of Robinson; and Wilson, in the prisoner's presence, stated that he had come to weigh the fat which he had brought from Mr. Robinson's. The prosecutor told Wilson that he would not pay him for the fat until he had seen Mr. Robinson, and left the warehouse for that purpose. Wilson immediately ran away, and the prisoner, after offering to the prosecutor's wife if he was forgiven to tell all, ran away too, and was not apprehended until some time afterwards, at some distance from Hull.

I told the jury that if they were satisfied that the prisoner removed the fat from the upper room to the candle-room, and placed it in the scales with the intention of selling it to the prosecutor as fat belonging to Mr. Robinson, and with the intention of appropriating the proceeds to his own use, the offense amounted to larceny.

The jury found the prisoner guilty.

* * * * * * * * * *

LORD DENMAN, C. J. The taking is admitted. The question is whether there was an intention to deprive the owner entirely of his property; how could he deprive the owner of it more effectually than by selling it? To whom he sells it cannot matter. The case put of the bank note would be an ingenious larceny, but no case can be more extreme than this.

PARKE, B. In this case there is the intent to deprive the owner of the dominion over his property, for it is put into the hands of an intended vendor, who is to offer it for sale to the owner, and if the owner will not buy it, to take it away again.

The case is distinguishable from that of R. v. Holloway by the existence of this intent, and further by the additional impudence of the fraud.

ALDERSON, B. I think that he who takes property from another intends wholly to deprive him of it, if he intend that he shall get it back again under a contract by which he pays the full value for it.

COLERIDGE, J., and COLTMAN, J., concurred.

Conviction affirmed.

Larceny from the Person.

REGINA v. SELWAY.

8 Cox C. C. 235 (Eng.). 1859.

The prisoners were indicted for robbery and stealing from the person. The evidence showed that the prosecutor, who was paralyzed, received, while sitting on a sofa, in a room at the back of his shop, a violent blow on the head from one of the prisoners, whilst the other went to a cupboard in the same room, and stole therefrom a cash box, with which he made off.

Orridge, for the prisoners, submitted that on this evidence there was no proof of a stealing from the person. The cash box at the time it was stolen was at some distance from the place where the prosecutor was sitting, and could not be said, therefore, to be about his person.

Robinson, for the prosecution, contended that it was quite sufficient for the purposes of the indictment to show that the cash box was under the protection of the prosecutor; it need not be in his bodily possession. He was near enough to it to protect it, at least by raising an alarm. It was laid down in 1 Hale P. C. 533, "If a thief put a man in fear, and then in his presence drive away his cattle, it is a robbery. So, if a man being assaulted by a robber throw his purse into a bush, or flying from a robber let fall his hat, and the robber in his presence take up the purse or hat and carry it away, this would be robbery."

The Common Sergeant, having consulted Mr. Justice Crowder and Mr. Baron Channell, held that although the cash box was not

taken from the prosecutor's person, yet it being in the room in which he was sitting, he being aware of that fact, it was virtually under the protection of his person. He should under the circumstances leave this question to the jury: Was the cash box under the protection of the prosecutor's person at the time when it was stolen?

The jury found that it was. Guilty.

CHAPTER XXII.

EMBEZZLEMENT—LARCENY BY BAILEE—CHEATING.

Possession of the Property.

REGINA v. MASTERS.

1 Denison C. C. 332 (Eng.). 1848.

Orlando Masters, a clerk in the employment of William Holliday, was tried at the Michaelmas quarter sessions, A. D. 1848, for the borough of Birmingham, on an indictment charging him with embezzling three sums of money received by him for and on account of his master, the prosecutor.

It appeared in evidence that the course of business adopted by the house was for the customers to pay moneys into the hands of certain persons, who paid them over to a superintendent; he accounted with the prisoner, and paid over such moneys to him, and the prisoner, in his turn, accounted with cashiers, and paid over the moneys to them, he having no other duty to perform with respect to such moneys than to keep an account which might act as a check on the superintendent and the cashiers, their accounts being in like manner checks upon him. These four parties to the receipt of the moneys are all servants of the prosecutor.

With respect to the three sums in question, it was proved that they passed in due course from the customers through the hands of the immediate receivers and the superintendent to the prisoner, who wilfully and fraudulently retained them.

On behalf of the prisoner it was objected, on the authority of Rex v. Murray, 1 Moody's C. C. 276, that the moneys having, before they reached the prisoner, been in the possession of the prosecutor's servants, did in law pass to the prisoner from his master, and that consequently the charge of embezzlement could not be sustained.

The Recorder left the case to the jury reserving the point.

The prisoner was convicted and sentenced to twelve months' imprisonment, with hard labor.

This case was argued before Pollock, C. B., Patteson, J., Maule, J., Creswell, J., Erle, J., on the 11th of November, 1848, at the first sitting of the court created by stat. 11 and 12 Vict., c. 78.

POLLOCK, C. B. The court are unanimously of opinion that no further argument is necessary. This case is quite different from that of R. v. Murray, 1 Moo. C. C. 276. There the case was not within the stat. 7 and 8 Geo. 4, c. 29, § 47, because the master had had possession of the money by the hands of another servant; and when it was given to the prisoner by that servant to be paid away on account of the master, it must be deemed in law to have been so given to the prisoner by his master; the fraudulent appropriation of it being thus a tortious taking in the first instance, was not embezzlement but larceny. But here the money never reached the master at all: it was stopped by the prisoner on its way to him. The original taking was lawful, and therefore the fraudulent appropriation was embezzlement.

Cheating.

COMMONWEALTH v. WARREN.

6 Mass. 72. 1809.

Indictment against Amos Warren for that he, being an evil disposed person, and contriving and intending one Benjamin Adams to deceive, cheat and defraud, falsely pretended and affirmed to the said Adams, that his, the defendant's name, was William Waterman, that he lived in Salem, and there kept a grocery store, that he wished to purchase on credit of Adams fifty pair of shoes, giving his own note as security therefor;—that Adams, giving credit to his false pretenses and affirmations, sold him the shoes, and took as security the note of the defendant subscribed by him with the name of William Waterman. The defendant, having been convicted, moved in arrest of judgment, on the ground that the facts charged in the indictment, and of which he had been found guilty, were a private injury only, and did not amount to a public offense.

PARSONS, C. J. At common law it is an indictable offense to cheat any man of his money, goods or chattels, by using false weights or false measures: and by the English statute of 33 Hen. VIII., c. 1, passed before the settlement of this country, and considered here as a part of our common law, cheating by false tokens is made an indictable offense. The object of the law is, to protect persons, who in their dealings use due diligence and precaution, and not persons who suffer through their own credulity, carelessness or negligence. But as prudent persons may be overreached by means of false weights, measures or tokens, or by a conspiracy, where two or more persons confederate to cheat, frauds effected in either of these ways are punishable by indictment. And by an English statute of 30 Geo. II., c. 24, which is not in force in this state, the same prosecution has been extended to cheating by false pretenses.

But if a man will give credit to the false affirmation of another, and thereby suffer himself to be cheated, he may pursue a civil remedy for the injury, but he cannot prosecute by indictment.

If therefore Adams was cheated out of his shoes by the defendant, without using false weights, measures or tokens, and by no conspiracy, but only by his credulity in believing the lies of the defendant, although he may have an action against the defendant to recover his damages, yet this indictment cannot be maintained, whatever false pretenses the defendant may have wickedly used.

And it appears that Adams was imposed on by the gross lies of the defendant. He pretended and affirmed that his name was William Waterman, and that he was a grocer in good credit in Salem. Adams unfortunately believing him, sold and delivered him the shoes on credit: and when the defendant gave his note as security, he used his false name.

We see here no conspiracy, for the defendant was alone in the fraud:—and no false tokens to induce a credit: and as for false weights or measures, there is no pretense. We cannot therefore consider the facts stated in the indictment (however injurious they were to Adams) as constituting a public indictable offense.

Judgment arrested.

CHAPTER XXIII.

OBTAINING PROPERTY BY FALSE PRETENSE.

The Property Obtained.

MOORE v. COMMONWEALTH.

8 Pa. 260. 1848.

This was an indictment under the 21st section of the act of the 12th July, 1842, entitled, "An act to abolish imprisonment for debt, and to punish fraudulent debtors," against Johnson Moore, the defendant below, for passing a worthless $5 note of the Commercial Bank of Millington, in the State of Maryland, on Philip Harman, the prosecutor, representing the said note as a good one, and thereby obtaining a receipt in full from Harman, in discharge of a debt due and owing by the said Moore to the said Harman.

BURNSIDE, J. The indictment in question is predicated, and attempted to be supported, on the 21st section of the act, which provides "that every person who with intent to cheat and defraud another, shall designedly, by reason of any false token, in writing, or by any false pretense whatever, obtain from any person any money, personal property, or other valuable things, upon conviction," &c.

What did the defendant obtain? A receipt for an old debt, which on the allegations in the indictment is not worth a farthing. A receipt is always open to explanation, and when obtained by fraud, or given either under a mistake of facts or an ignorance of the law, it may be inquired into and corrected in a court of law as well as in equity: Thompson v. Vanfort, 1 Pre., ch. 182, 185; vide Receipt, in Whart. Dig.

The payment alleged on the face of the indictment was no payment, and the receipt was no bar to Harman's recovering his debt. If Moore had obtained any money or merchandise, or anything of value from Harman, his case would be within the provi-

sions of the act; but as the receipt was for a preceding debt, and if that receipt was obtained by fraudulent misrepresentations, and without value, it was neither a cheat at common law, or within the statute. The object of the 21st section of the act, was to prevent the obtaining of money, or goods, or other valuable things, by false tokens or false pretenses, and has no relation to the payment and settlement of old debts and accounts. Paying an old debt with base coin, or a worthless note, is no payment, and the person receiving the base coin, or the worthless note, has the same remedy at least to recover his debt that he had before the alleged payment took place. The debt was not extinguished by the receipt. It was not the obtaining of money or goods by a false token or pretense. It was a fruitless attempt to pay and discharge an old account. Judgment reversed.

Rogers and Coulter, JJ., dissented.

The Character of the Pretense.

REGINA v. BRYAN.

7 Cox C. C. 312 (Eng.). 1857.

The following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Recorder of London.

At a Session of Gaol Delivery, holden for the jurisdiction of the Central Criminal Court, on the 2nd day of February, A. D. 1857, John Bryan was tried before me for obtaining money by false pretenses.

There were several false pretenses charged in the different counts of the indictment, to which, as he was not found guilty of them by the jury, it is not necessary to refer. But the following pretenses were among others charged. That certain spoons produced by the prisoner were of the best quality, that they were equal to Elkington's A (meaning spoons and forks made by Messrs. Elkington, and stamped by them with the letter A), that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The prosecutors were pawnbrokers, and the false pretenses were made use of by the prisoner for the purpose of procuring advances of money on the spoons in question offered by the prisoner by way

of pledge, and he thereby obtained the moneys mentioned in the indictment by way of such advances. The goods were of inferior quality to that represented by the prisoner, and the prosecutors said that, had they known the real quality, they would not have advanced money upon the goods at any price. They moreover admitted that it was the declaration of the prisoner as to the quality of the goods, and nothing else, which induced them to make the said advances. The moneys advanced exceeded the value of the spoons. The jury found the prisoner guilty of fraudulently representing that the goods had as much silver on them as Elkington's A, and that the foundations were of the best material, knowing that to be untrue; and that in consequence of that he obtained the moneys mentioned in the indictment. The prisoner's counsel claimed to have the verdict entered as a verdict of Not Guilty, which was resisted by the counsel for the prosecution; and, entertaining doubts upon the question, I directed a verdict of Guilty to be entered, in order that the judgment of the Court for the Consideration of Crown Cases might be taken in the matter; and the foregoing is the case on which that judgment is requested. * * *

Russell Gurney.

LORD CAMPBELL, C. J. I am of opinion that this conviction cannot be supported. It seems to me to proceed upon a mere misrepresentation, during the bargaining for the purchase of a commodity, of the quality of that commodity. In the last case which we disposed of, Reg. v. Sherwood, after the purchase had been completed, there was a distinct averment, which was known to be false, respecting the quantity of the goods delivered, and in respect of that misrepresentation a larger sum of money (the amount of which could be easily calculated) was received by the person who sold them than he was entitled to ask, and therefore I thought, and I think now, that that was clearly a case within the act of Parliament; but here, if you look at what is stated upon the face of the case, it resolves itself into a mere misrepresentation of the quality of the article; and, bearing in mind that the article was of the species that it was represented to be to the purchaser, because these were spoons with silver upon them, although not of the same quality as was represented, the pawnbroker received these spoons, and they were valuable,

although the quality was not equal to what had been represented. Now it seems to me it never could have been the intention of the Legislature to make it an indictable offense for the seller to exaggerate the quality of that which he was selling any more than it would be an indictable offense for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to that which they really were. Such an extension of the criminal law is most alarming, for not only would sellers be liable to be indicted for exaggerating the good qualities of the goods, but purchasers would be liable to be indicted if they depreciated the quality of the goods, and induced the sellers, by that depreciation, to sell the goods at a lower price than would have been paid for them had it not been for that representation. As yet I find no case in which a mere misrepresentation at the time of sale of the quality of the goods has been held to be an indictable offense. In Regina v. Roebuck the article delivered was not of the species bargained for; there the bargain was for a silver chain, and the chain was not of silver, but was of some base metal, and was of no value. But here the spoons were spoons of the species that was bargained for, although the quality was inferior. It seems to me therefore that this is not a case within the act of Parliament, and that the conviction cannot be supported.

Conviction quashed.

CHAPTER XXIV.

RECEIVING STOLEN GOODS.

Character of the Goods.

REGINA v. SCHMIDT.

10 Cox C. C. 172 (Eng.). 1866.

Case reserved for the opinion of this Court by the Deputy-Chairman of the Quarter Sessions for the Western Division of the county of Sussex.

John Daniels, John Scott, John Townsend, and Henry White, were indicted for having stolen a carpet-bag and divers other articles the property of the London, Brighton and South Coast Railway Company; and the prisoner, Fanny Schmidt, for having feloniously received a portion of the same articles, well knowing the same to have been stolen.

The evidence adduced before me as Deputy-Chairman of the Court of Quarter Sessions at Chichester, for the Western Division of the county of Sussex, on the 20th of October, 1865, so far as relates to the question I have to submit to the Court of Criminal Appeals, was as follows:

On the 29th of July, 1865, two passengers by the prosecutors' line of railway left a quantity of luggage at the Arundel station, which luggage was shortly afterwards stolen therefrom.

On the 30th of July a bundle containing a portion of the stolen property was taken to the Angmering station, on the same line of railway, by the prisoner Townsend, and forwarded by him to the female prisoner, addressed "Mr. F. Schmidt, Waterloo street, Hove, Brighton." The bundle was transmitted to Brighton, in the usual course, on Sunday morning the 30th.

Meanwhile the theft had been discovered, and shortly after the bundle had reached the Brighton Station a policeman (Carpenter), attached to the railway company, opened it, and having satisfied himself that it contained a portion of the property stolen from the Arundel station, tied it up again and directed a

porter (Dunstall), in whose charge it was, not to part with it without further orders.

About 8 p. m. of the same day (Sunday, 30th) the prisoner, John Scott, went to the station at Brighton and asked the porter (Dunstall) if he had got a parcel from the Angmering station in the name of Schmidt, Waterloo street. Dunstall replied "No." Scott then said, "It is wrapped up in a silk handkerchief and is directed wrong, it ought to have been directed to 22 Cross street, Waterloo street." Dunstall in his evidence added, "I knew the parcel was at the station, but I did not say so because I had received particular orders about it."

The four male prisoners were apprehended the same evening in Brighton on the charge, for which they were tried before me and convicted.

On Monday morning, the 31st of July, the porter (Dunstall), by the direction of the policeman (Carpenter), took the bundle to the house No. 22 Cross street, Waterloo street, occupied as a lodging house and beer house by the female prisoner and her husband (who was not at home or did not appear) and asked if her name was Schmidt, on ascertaining which he left the bundle with her and went away. Carpenter and another policeman then went to the house, found the bundle unopened, and took the prisoner to the Town hall.

All the prisoners were found guilty, and I sentenced each of them to six months' imprisonment with hard labor. They are now in Petworth gaol in pursuance of that sentence.

At the request of the counsel for the female prisoner I consented to reserve for the opinion of this Court the question,

Whether the goods alleged to have been received by her had not, under the circumstances stated, lost their character of stolen property, so that she ought not have been convicted of receiving them with a guilty knowledge within the statute?

Hasler Hollist.

* * * * * * * * * *

[Erle, C. J., and Mellor, J., were of opinion that the conviction was right, but Martin, B., Keating and Lush, JJ., held the conviction wrong. In consequence of the prisoner having suffered half the term of imprisonment from inability to get bail and the further unavoidable delay, the case was not sent to be argued before all the judges.] * * *

ERLE, C. J. I am of opinion that the conviction was right. The question is whether, at the time this stolen property was received by the prisoner, it was the property of the London and Brighton Railway Company; and if so, whether, when the policeman Carpenter caused the delivery to be stopped for the purpose of detecting the parties implicated, it thereby lost the character of stolen property. If it had lost the character of stolen property at the time it was received by the prisoner, the receiving by her will not amount to felony. But in this case I think that the railway company, when they took this bundle into their possession, were acting as bailees of the thief, and were innocent agents in forwarding it to the receiver, and that the things did not lose their character of stolen property by what was done by the policeman.

KEATING, J. I agree with my brother, Martin, that the conviction was wrong. It seems conceded, on the authority of Dolan's case, that if the property had got back again for any time into the hands of the true owner, the conviction would be wrong. It is said that, in this case, the owners mentioned in the indictment, the railway company, were not the real owners, whereas in Dolan's case the real owner intervened. But I think there is no distinction in principle between this case and that. The railway company are alleged in the indictment to be the owners of the property, and we sitting here can recognize no other persons than them; they are the owners from whom the property was stolen, and it got back to their possession before it was received by the prisoner. I can see no real distinction between this case and Dolan's. All the reasons given for the judgment in that case apply equally to the case of the ownership in this case. The principle I take to be, that when once the party having the right of control of the property that is stolen gets that control, the transaction is at an end, and there can be no felonious receipt afterwards. I think the test put by my brother Lush in the course of the argument, as to the real owner suing the railway company for the property after they had got the control of it, is decisive of the matter. * * *

Conviction quashed.

CHAPTER XXVI.

BURGLARY.

The Place Entered.

QUINN v. PEOPLE.

71 N. Y. 561. 1878.

FOLGER, J. The plaintiff in error was indicted of the crime of burglary in the first degree, under the section of the Revised Statutes defining that crime. 2 R. S., p. 668, § 10, subd. 1. The crime, as there defined, consists in breaking into, and entering in the night time, in the manner there specified, the dwelling house of another, in which there is at the time some human being, with the intent to commit some crime therein. The evidence given upon the trial showed clearly enough the breaking and entering, and the criminal intent. The questions mooted in this court are, whether it is legally proper, in an indictment for burglary of a dwelling house, to aver the ownership of the building in a partnership, and whether the proof showed that the room entered was a dwelling house within the intent of the statute.

As to the second question: It is needed only to note that there was an internal communication between the two stores, in the lower stories of the buildings, but none between them and the upper rooms, in which one of the partners and other persons lived. The room into which the plaintiff in error broke was used for business purposes only, but it was within the same four outer walls, and under the same roof as the other rooms of the buildings. To pass from the rooms used for business purposes to the rooms used for living in, it was necessary to go out of doors into a yard fenced in, and from thence up stairs. The unlawful entering of the plaintiff in error was into one of the lower rooms used for trade, and into that only. The point made is, that as there was no internal communication from that room to the rooms used for dwellings, and as that room was not necessary for the dwelling rooms, there was not a breaking into a dwelling

house, and hence the act was not burglary in the first degree as defined by the Revised Statutes as cited above. In considering this point, I will first say that the definition of the crime of burglary in the first degree, given by the Revised Statutes, does not, so far as this question is concerned, materially differ from the definition of the crime of burglary as given at common law, to wit, "a breaking and entering the mansion house of another in the night, with intent to commit some felony within the same." * * * 2 Russ. on Cr., p. 1, § 785. It will, therefore, throw light upon this question to ascertain what buildings or rooms were, at common law, held to be dwelling houses or a part thereof, so as to be the subject of burglary. For, as far as the Revised Statutes as already cited are concerned, what was a dwelling house or a part thereof at common law, must also be one under those statutes. Now, at common law, before the adoption of the Revised Statutes, it had been held that it was not needful that there should be an internal communication between the room or building in which the owner dwelt, if the two rooms or buildings were in the same enclosure, and were built close to and adjoining each other. Case of Gibson, Mutton & Wiggs, Leach's Cr. Cases, 320 [case 165], recognized in The People v. Parker, 4 J. R., 423. In the case from Leach, there was a shop built close to a dwelling house in which the prosecutor resided. There was no internal communication between them. No person slept in the shop. The only door to it was in the courtyard before the house and shop, which yard was inclosed by a brick wall, including them within it, with a gate in the wall serving for ingress to them. The breaking and entering was into the shop. Objection was taken that it could not be considered the dwelling house of the prosecutor, and the case was reserved for the consideration of the twelve Judges. They were all of the opinion that the shop was to be considered a part of the dwelling house, being within the same building and the same roof, though there was only one door to the shop, that from the outside, and that the prisoners had been duly convicted of burglary in a dwelling house. The case in Johnson's Reports, supra, is also significant, from the facts relied upon there to distinguish it from the case in Leach, supra. Those facts were that the shop entered, in which no one slept, though on the same lot with the dwelling house was twenty feet from it, not inclosed

by the same fence, nor connected by a fence, and both open to a street. The court said that they were not within the same curtilage, as there was no fence or yard inclosing both so as to bring them within one inclosure, therefore, the case was within that of The King v. Garland, 1 Leach, Cr. Cas., 130 [or 171], Case 77. It has been urged, in the consideration of the case in hand, that though the common law did go farther than the cases above cited, and did deem all out-houses, when they were within the same inclosure as the dwelling house, a part of it, yet that they must, to be so held, be buildings or rooms the use of which subserved a domestic purpose, and were thus essential or convenient for the enjoyment of the dwelling house as such. Gibson's Case, supra, would alone dispose of that. The building there entered was not only of itself a shop for trade, but it was in the use and occupation of a person other than the owner of the dwelling house. The books have many cases to the same end. Rex v. Gibbons & Kew, Russ. & Ry. 442, the case of a shop. Robertson's Case, 4 City Hall Rec., 63, also a shop with no internal communications with the dwelling house. Rex v. Stock et al., Russ. & Ry., 185, a counting room of bankers. Ex parte Vincent, 26 Ala., 145, one room in a house used as a wareroom for goods; Rex v. Witt, Ry. & M., 248; an office for business, below lodging rooms. Indeed, the essence of the crime of burglary at common law is the midnight terror excited, and the liability created by it of danger to human life, growing out of the attempt to defend property from depredation. It is plain that both of these may arise, when the place entered is in close contiguity with the place of the owner's repose, though the former has no relation to the latter by reason of domestic use or adaptation. Besides, the cases have disregarded the fact of domestic use, necessity or convenience, and have found the criterion in the physical or legal severance of the two departments or buildings; Rex v. Jenkins, Russ. & Ry., 244; Rex v. Westwood, Id., 495; where the separation of the buildings was by a narrow way, both of them being used for the same family domestic purposes. It is not to be denied that there are some cases which do put just the difference above noted, as now urged for the plaintiff in error. State v. Langford, 1 Dev., 253; State v. Jenkins, 5 Jones, 430; State v. Bryant Ginas, 1 Nott. & McCord, 583. Though, in the case last cited, it is conceded

that if a store is entered, which is a part of a dwelling house, by being under the same roof the crime is committed; and it must be so, if it is the circumstance of midnight terror in breaking open a dwelling house, which is a chief ingredient of the crime of burglary; and it is for that reason that barns and other out-houses, if in proximity to the mansion house, are deemed *quasi* dwelling houses, and entitled to the same protection. State v. Brooks, 4 Conn., 446-449. Coke, 3 Inst., 64, is cited to show that only those buildings or places, which in their nature and recognized use are intended for the domestic comfort and convenience of the owner, may be subject of burglary at common law; but in the same book and at the same page the author also says: "But a shop wherein any person doth converse"—i. e., be employed or engaged with; Richardson's Dic., *in voce;* "being a parcel of a mansion house, or not parcel, is taken for a mansion-house." So Hale is cited, I vol. P. C., 558; and it is there said that, "to this day it is holden no burglary to break open such a shop." But what does he mean by that phrase? That appears from the authority which he cites, Hutton's Reps., 33; where it was held no burglary to break and enter a shop, held by one as a tenant in the house of another, in which the tenant worked by day, but neither he nor the owner slept by night. And the reason given is the one above noticed and often recognized by the cases, that by the leasing there was a severance in law of the shop from the dwelling house. But Hale also, vol. I, P. C., page 557, cites as law the passage from The Institutes above quoted. Other citations from text-books are made by the plaintiff in error; they will be found to the same effect, and subject to the same distinction as those from Coke & Hale. And see Rex v. Gibbons, et al., supra; Rex v. Richard Carroll, 1 Leach Cr. Cas., 272, case 115. That there must be a dwelling house, to which the shop, room, or other place entered belongs as a part, admits of no doubt. To this effect, and no more, are the cases cited by the plaintiff in error, of Rex v. Harris, 2 Leach, 701; Rex v. Davies, alias Silk, Id., 876, and the like. There were cases which went further than anything I have asserted. They did not exact that the building entered should be close to or adjoining the dwelling house, but held the crime committed, if the building entered was within the same fence or enclosure as the building slept in. And the dwell-

ing house in which burglary might be committed was held formerly to include out-houses—such as warehouses, barns, stables, cow houses, dairy houses—though not under the same roof or joining contiguous to the house, provided they were parcel thereof. 1 Russ. on Cr., *799, and authorities cited. Any out-house within the curtilage, or same common fence with the dwelling-house itself, was considered to be parcel of it, on the ground that the capital house protected and privileged all its branches and appurtenants, if within the curtilage or home-stall. State v. Twitty, 1 Hayw., N. C., 102; State v. Wilson, Id., 242; see also State v. Ginns, 1 Nott. & McCord, 585, supra, where this is conceded to be the common law; see note *a* to Garland's Case, supra.

It seems clear, that at common law the shop which the plaintiff in error broke into would have been held a part of a dwelling house.

I am brought to the conclusion that upon the facts proven, the plaintiff in error was properly indicted and convicted of the statutory crime of burglary in the first degree.

Allen, Miller and Earl, JJ., concur; Rapallo and Andrews, JJ., dissent; Church, C. J., not voting.

Judgment affirmed.

LEADING ILLUSTRATIVE CASES
LAW OF CRIMINAL PROCEDURE

CHAPTER I.

JURISDICTION AND VENUE.

Jurisdiction—Crime Committed in One State by Means Sent from Another.

STATE v. HALL.

114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822. 1894.

Appeal from superior court, Cherokee county; Graves, Judge.

Prosecution against William Hall and John Dockery for murder. From a judgment of conviction, defendants appeal. Reversed.

Hall as principal, and Dockery as accessory before the fact, were indicted for the murder of Andrew Bryson. The testimony tended to prove that when the shooting occurred the defendants were in North Carolina and Bryson in Tennessee.

SHEPHERD, C. J. There was testimony tending to show that the deceased was wounded and died in the state of Tennessee, and that the fatal wounds were inflicted by the prisoners shooting at the deceased while they were standing within the boundaries of the state of North Carolina. The prisoners have been convicted of murder, and the question presented is whether they committed that offense within the jurisdiction of this state.

It is a general principle of universal acceptation that one state or sovereignty cannot enforce the penal or criminal laws of another, or punish crimes or offenses committed in and against another state or sovereignty. Ror. Interst. Law, 308; Story, Confl. Law, 620-623; The Antelope, 10 Wheat. 66-123; State v. Knight, Tayl. (N. C.) 65; State v. Brown, 1 Hayw. (N. C.) 100; State v. Cutshall, 110 N. C. 538, 15 S. E. 261. There may, by

reason of "a statute or the nature of a particular case," be apparent exceptions to the rule; as, if "one personally out of the country puts in motion a force which takes effect in it, he is answerable where the evil is done, though his presence was elsewhere. So, where a man, standing beyond the outer line of a territory, by discharging a ball over the line kills another within it; or himself, being abroad, circulates libel here, or in like manner obtains here goods by false pretenses; or does any other crime in our own locality against our laws,—he is punishable, though absent, the same as if he were present." 1 Bish. Cr. Law, 109, 110; State v. Cutshall, supra. These cases, however, are but instances of crimes which are considered by the law to have been committed within our territory, and in no wise conflict with the general principle to which we have referred. Starting, then, with this fundamental principle, and avoiding a general discussion of the subject of extraterritorial crime, we will at once proceed to an examination of the interesting question which has been submitted for our determination. It seems to have been a matter of doubt, in ancient times, whether, if a blow were struck in one county, and death ensued in another, the offender could be prosecuted in either, though, according to Lord Hale (P. C. 426), "the more common opinion was that he might be indicted where the stroke was given." This difficulty, as stated by Mr. Starkie, was sought to be avoided by the legal device "of carrying the dead body back into the county where the blow was struck; and the jury might there," he adds, "inquire both of the stroke and death." 1 Starkie, Cr. Pl. (2d. Ed.) 304; 1 Hawk. P. C. 13; 1 East, P. C. 361. But to remove all doubt in respect to a matter of such grave importance, it was enacted by the Statute 2 & 3 Edw. VI. that the murderer might be tried in the county where the death occurred. This statute, either as a part of the common law or by re-enactment, is in force in many of the states of the Union, and, as applicable to counties within the same state, its validity has never been questioned. See Acts 1891, c. 68, and also Code Tenn. § 5801. But, where its provisions have been extended so as to affect the jurisdiction of the different states, its constitutionality has been vigorously assailed. Such legislation, however, has been very generally, if not, indeed, uniformly, sustained. Simpson v. State, 4 Humph. 461; Green v. State, 66 Ala. 40; Com. v.

Macloon, 101 Mass. 1; Tyler v. People, 8 Mich. 326; Hemmaker v. State, 12 Mo. 453; People v. Burke, 11 Wend. 129; Hunter v. State, 40 N. J. Law, 495. Statutes of this character "are founded upon the general power of the legislature, except so far as restrained by the constitution of the commonwealth and the United States, to declare any willful or negligent act which causes an injury to person or property within its territory to be a crime." Kerr, Hom. 47. See, also, remarks of Justice Bradley in the habeas corpus proceedings of Guiteau, reported in the notes to the case of U. S. v. Guiteau, 47 Am. Rep. 247, 1 Mackey, 498. In many of the states there are also statutes substantially providing that where the death occurs outside of one state, by reason of a stroke given in another, the latter state may have jurisdiction. See our act (Code, § 1197). The validity of these statutes seems to be undisputed; and indeed it has been held in many jurisdictions that such legislation is but in affirmance of the common law. This view is taken by the supreme court of the District of Columbia in Guiteau's Case, supra, in which the authorities are collected, and their principle stated, with much force by Justice James. It is manifest that statutes of this nature are only applicable to cases where the stroke and the death occur in different jurisdictions; and it is equally clear that, where the stroke and the death occur in the same state, the offense of murder at common law is there complete, and the courts of that state can alone try the offender for that specific common-law crime."

The turning point, therefore, in this case, is whether the stroke was, in legal contemplation, given in Tennessee, the alleged place of the death; and upon this question the authorities all seem to point in one direction. In the early case of Rex v. Coombes, 1 Leach, 388, it was held that "if a loaded pistol be fired from the land at a distance of 100 yards from the sea, and a man is maliciously killed in the water 100 yards from the shore, the offender shall be tried by the admiralty jurisdiction, for the offense is committed where the death happened, and not at the place whence the cause of the death proceeds." See, also, 1 East., P. C. 367, and 1 Chit. Cr. Law, 154. In the case of U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, a gun was fired from an American ship lying in the harbor of Raiatea, one of the Society Isles, and a foreign government, by which a person on board a

schooner belonging to the natives, and lying in the same harbor, was killed. Mr. Justice Story, in the course of his opinion, said: "What we found ourselves upon in this case is that the offense, if any, was committed on board of a foreign schooner belonging to inhabitants of the Society Islands, and of course under the territorial government of the Society Islands, with which kingdom we have trade and friendly intercourse, and which our government may be presumed (since we have a consul there) to recognize as entitled to the rights and sovereignty of an independent nation, and of course entitled to try offenses committed within its territorial jurisdiction. I say the offense was committed on board of the schooner; for, although the gun was fired from the ship Rose, the shot took effect, and the death happened, on board of the schooner, and the act was, in contemplation of law, done where the shot took effect. * * * We lay no stress on the fact that the deceased was a foreigner. Our judgment would be the same if he had been an American citizen." In Simpson v. State, 17 S. E. 984, it was held by the supreme court of Georgia that one who, in the state of South Carolina, aims and fires a pistol at another who, at the time, is in the state of Georgia, is guilty of the offense of "shooting at another," although the ball did not take effect, but struck the water in the latter state. The court said: "Of course, the presence of the accused within this state is essential to make his act one which is done in this state. But the presence need not be actual; it may be constructive. The well-established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. * * * So, if a man in the State of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes. If an unlawful shooting occurred while both the parties were in this state, the mere fact of missing would not render the person who shot any the less guilty. Consequently, if one shooting from another state goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle." The court approved of the language of Campbell, J., in Tyler v. People, 8 Mich. 320, that "a wounding must of course be done where there is a person wounded, and

the criminal act is the force against his person. That is the immediate act of the assailant, whether he strikes with a sword or shoots with a gun, and he may very reasonably be held present where his forcible act becomes directly operative." In speaking of the crime committed, by one out of the state, through an innocent agent, Judge Rorer says: "In such case the innocent person in the state is the means used to perpetrate the crime therein, just as if a person who shoots out of a state across the line into another state, and therein intentionally kills another person, is in such case guilty of committing the criminal act within the state without himself being at the time therein." Interst. Law, 326.

In Com. v. Macloon, supra, Justice Gray says that, if one's "unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result is not essential. He may be held guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction." In State v. Carter, 27 N. J. Law, 499, the supreme court of New Jersey, in discussing a kindred question, said: "This is not the case where a man stands on the New York side of the line, and, shooting across the border, kills one in New Jersey. When that is so, the blow is in fact struck in New Jersey. It is the defendant's act in this state. The passage of the ball after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile passes over a boundary in the act of striking is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the state as where he stands in it." In State v. Chapin, 17 Ark. 560, the court said: "For example, if a man standing beyond our boundary line, in Texas, were, by finding a gun or propelling any other implement of death, to kill a person in Arkansas, he would be guilty of murder here, and answerable to our laws, because the crime is regarded as being committed where the shot or other implement propelled takes effect." See, also, People v. Adams, 3 Denio, 207. In Stillman v. Manufacturing Co., 3 Woodb. & M. 538, Fed. Cas. No. 13,446, Woodbury, J., said: "I

can conceive of crimes, likewise, like civil injuries, which may be prosecuted in two states, though sometimes in different forms as here. * * * So, if one fires a gun in one state, which kills an individual in another state, there may be the offense of using a deadly weapon in the first state (that is, we suppose, by statute) and committing murder by killing in the second state."

In speaking of the validity of acts similar to that of Edw. VI., supra, Mr. Black, in an article in the Central Law Journal (volume 32, p. 319), remarks: "There is less difficulty in cases where the means of death employed, though set in motion in one jurisdiction, reach and operate upon their object in another territory, for of course the act can amount to nothing more than an attempt until the fatal agency comes in contact with the body of the victim." See, also, upon this subject, 20 Am. Law. Rev., p. 918.

In view of the foregoing authorities, it cannot be doubted that the place of the assault or stroke in the present case was in Tennessee; and it is also clear that the offense of murder at common law was committed within the jurisdiction of that state. If this be so, it must follow that unless we have some statute expressly conferring jurisdiction upon the courts of this state, or making the act of shooting under the circumstances a substantive murder, the offense with which the prisoners are charged can only be tried by the tribunals of Tennessee. It is true that in Wharton's Criminal Law (§ 288) it is said in a general way that "a concurrent jurisdiction exists in the place of starting the offense;" but by a reference to the cases cited in support of the proposition it will be readily seen that they have no application to the question under consideration. These and like authorities are where libels are uttered in one state to take effect in another (U. S. v. Worrall, 2 Dall. 388); or where, either by common law or by statute, the place of the stroke has concurrent jurisdiction (Green v. State, supra); or where an accessory before the fact in one state to a felony committed in another was held to be indictable in the state where he became accessory (State v. Chapin, supra); or in certain cases of false pretenses, or in conspiracies, where an overt act is committed at the place of the trial; or where, by statute, a particular "section" of an offense committed in one jurisdiction is there made indictable, as, for

instance, the act of shooting or unlawfully using a deadly weapon within the state, as in the present case. In some instances there may be concurrent jurisdiction of the whole offense, and in others there may exist the jurisdiction of an attempt in one state and of the consummated offense in another. In a note to the preceding section the author thus explains: "The place of such residence [that is, where the offense is started] has jurisdiction over the attempt or conspiracy, as the case may be. The place of the consummation has jurisdiction of the offense consummated on its soil." In respect to this very matter the learned author has made his meaning entirely clear in his article on the conflict of laws. 1 Cr. Law Mag. 695. In putting the case of A., in New York, shooting B. in Connecticut, he says that the place of the consummation of the crime should be regarded as its locality. "Until such consummation, a crime, so far as jurisdiction is concerned, is simply an attempt, and only punishable as such. It may be indictable for A. merely to discharge a gun. It may be said: 'This is a dangerous act, punishable as such;' or it may be said: 'From all the circumstances of the case, we infer that you are attempting B.'s life, and you are to be indicted for this attempt.' But it is not until we see before us a man wounded by such a shot that the crime, in its completeness, exhibits itself."

There being, then, no concurrent jurisdiction at common law, we will now consider whether it has been conferred by statute; for it is well settled that "whenever a homicide is committed partly in, and partly out of, the jurisdiction where the charge is made, the power to punish it depends upon the question whether so much of the act as operates in the county or state in which the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction." Kerr, Hom. 226; Com. v. Macloon, supra.

It is not very seriously insisted on the part of the state that our statute (Code, § 1197) applies to this case, but inasmuch as it was referred to on the argument, it is proper that we should briefly examine into its provisions. It provides: "In all cases of felonious homicide, when the assault shall have been made within this state and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was

made, in the manner, to all intents and purposes, as if the person assaulted had died within the limits of this state." This statute has received a judicial construction by this court in State v. Dunkley, 3 Ired. 116, and it was held that it did not create any new offense, but merely removed a difficulty which existed as to the place of the trial. In view of the authorities cited, it can hardly be contended that the assault in the present case was committed in this state; and especially is this so when the assault mentioned in the statute evidently means, not a mere attempt, but such an injury inflicted in this state which results in death in another state.

This would seem manifest from the history of the legislation as well as the language of the act, which plainly contemplates that every part of the offense, except the death, must have occurred in this state. It was a subject of doubt, as we have seen, whether the accused could be tried in the place of the stroke, the death having occurred without the jurisdiction; and it was to remove this doubt alone that this and similar legislation was resorted to. It was, of course, never questioned that the place where both the stroke and the death occurred was the place where the crime was committed. We are relieved, however, from all doubt (if any existed) upon this point, by the opinion of Chief Justice Ruffin in Dunkley's Case, supra. He says that the act "does not profess to define 'felonious homicide,' or to constitute the crime by any particular acts, but merely says that in certain cases of felonious homicide the offender may be indicted, and of course tried and punished, in the county where the stroke was given,—meaning, though it does not (like the statute 2 & 3 Edw. VI.) expressly say so, 'in the same manner as if the death had happened in the same county where the stroke was given.'" As it is plain that, in contemplation of law, the stroke was given in Tennessee, we are of the opinion that there was error in refusing to give the instructions prayed for by the prisoners.

The fact that the prisoners and the deceased were citizens of the state of North Carolina cannot affect the conclusion we have reached. If, as we have seen, the offense was committed in Tennessee, the personal jurisdiction generally claimed by nations over their subjects who have committed offenses abroad or on the high seas cannot be asserted by this state. Such jurisdiction

does not exist, as between the states of the Union, under their peculiar relation to each other (Ror. Interst. Law, 308); and, even if it could be rightfully claimed, it could not, in a case like the present, be enforced in the absence of a statute providing that the offense should be tried in North Carolina. Even in England, where it seems the broadest claim to such jurisdiction is asserted, a statute (33 Hen. VIII.) appears to have been necessary in order that the courts of that country could try a murder committed in Lisbon by one British subject upon another. Rex v. Sawyer, Russ. & R. 294, cited and commented upon in Dunkley's Case, supra. In People v. Merrill, 2 Parker, Cr. R. 600, it is said that, by the common law, offenses were local, and the jurisdiction in such cases depends upon statutory provisions. See, also, Wheat. Int. Law, 115; 1 Whart. Cr. Law, 271; 1 Bish. Cr. Law, 121. Granting, however, that in some instances the jurisdiction may exist without statute, it is not exercised in all cases. Dr. Wharton says: "It has already been stated that as to crimes committed by subjects in foreign civilized states, with the single exception in England of homicides, the Anglo-American practice is to take cognizance only of offenses directed against the sovereignty of the prosecuting state, perjury before consuls and forgery of government documents being included in this head." To the same effect is 3 Am. & Eng. Enc. Law, 539, in which it is said: "As to offenses committed in foreign civilized lands, the country of arrest has jurisdiction only of offenses distinctively against its sovereignty." See, also, Dr. Wharton's article upon the subject in 1 Cr. Law Mag. 715.

As between the states, the question is so clear to us that we forbear a general discussion of the subject. We may further remark that, while it is true that the criminal laws of a state can have no extraterritorial force, we are of the opinion that it is competent for the legislature to determine what acts within the limits of the state shall be deemed criminal, and to provide for their punishment. It may also be observed that, in addition to its common-law jurisdiction, the state of Tennessee has provided by statute for the trial of an offender under the circumstances of this case.

For the reasons given, we are constrained to say that the prisoners are entitled to a new trial.

Venue at Common Law—Change of Venue.

HEWITT et al. v. STATE.

43 Fla. 194, 30 So. 795. 1901.

Error to circuit court, Duval county; Rhydon M. Call, Judge.

Dick Hewitt and others were convicted of murder, and bring error. Affirmed.

MABRY, J. In October, 1898, plaintiffs in error Dick Hewitt and Lum Hewitt were indicted in Bradford county for the murder of J. T. Johnson, and plaintiff in error Moss Hewitt and one Minnie Hewitt were jointly indicted with them as accessories before the fact of said murder. Upon a trial of the case in Bradford county, in January, 1899, the jury acquitted Minnie Hewitt, and disagreed as to the other defendants. The case came on for trial at another term of court in Bradford county, held in October, 1899, and after the exhaustion of two special venires, one for 100 jurors and the other for 25, and the issuance of another for 30 jurors, the court made the following order, viz.: "Came again the defendants, each in his own proper person and attended by his counsel; whereupon, it appearing to the court that a qualified jury cannot be obtained in this county to try said case, now, therefore, it is considered that said case be, and the same is hereby, transferred, and the venue changed to the circuit court of Duval county for trial." The order further provided for the transmission of the necessary papers to Duval county. It appears from a transcript of the proceedings in Bradford county that, in addition to the regular panel of jurors for the terms when the indictment was found and when the mistrial occurred, a special venire of 100 jurors was served for the last-mentioned term. When the court made the order changing the venue on the unsuccessful effort to obtain a jury, it appears that defendants neither requested it nor interposed any objection thereto.

The case came on for trial in Duval county without any objection on the part of defendants, and thereupon Dick Hewitt and Lum Hewitt were convicted of murder in the second degree, and Moss Hewitt was convicted of being accessory before the fact of said offense.

From the judgment of the court imposing the sentences of the law upon the defendants, writ of error has been sued out by them, and two grounds of error are presented for consideration, viz.: First, the court erred in changing the venue from Bradford county; second, Moss Hewitt should be discharged because under the laws of Florida a party cannot be convicted as being an accessory before the fact to murder in the second degree.

Our present constitution (§ 11, Declaration of Rights) declares that "in all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed." This provision was not contained in the constitution of 1868. Section 2358, Rev. St., provides that "all criminal causes shall be tried in the county where the offense was committed, except when otherwise provided by law." It is provided in § 2928, Id., that "the judge of the circuit court may order a change of venue in all criminal cases, when he shall be satisfied that it is impracticable to get a qualified jury to try the same in the county in which the crime was committed," and the change hereby authorized may be ordered, as provided in § 2929, "upon the application either of the prosecuting attorney or of the defendant, upon affidavit setting forth the necessity for such change." By chapter 4394, Laws 1895, it is enacted "that whenever it shall be made to appear to the satisfaction of the presiding judge of any of the circuit courts of this state that the venue of any cause, civil or criminal, then pending in such court, should for any of the grounds now prescribed by law be changed, it shall be in the power and discretion of such judge to change the venue of such cause, civil or criminal, as the case may be, from the circuit court of the county where such cause is at the time pending to the circuit court of any other county within the same circuit, but said judge shall not be compelled to transfer said cause to any adjoining county." Other provisions as to transfer of causes need not be mentioned. The provision in our constitution in reference to the right of trial by an impartial jury in the county where the crime is committed is an important one to the accused. At common law a defendant had a right to be tried in the county in which the offense was alleged to have been committed, where he was surrounded by the influences of a good character if he had established one, and where the witnesses were accessible for

the purposes of a trial. If an impartial trial could not be had in such county, the practice was to change the venue to some other county, where such trial could be obtained. The abuse of the right to change the venue to the detriment of the accused would be serious to him, and no doubt constitutional provisions like ours were designed to permanently secure this right. Some courts have held that the guaranty is not only of an impartial trial, but also a trial in the county where the offense was committed, and that it was not competent for the legislature to provide for a transfer to another county for any cause without the consent of the accused. Armstrong v. State, 1 Coldw. 338; Kirk v. State, Id. 344; State v. Knapp, 40 Kan. 148, 19 Pac. 728. Where a trial by an impartial jury can be secured in the county where the crime is committed, the accused cannot be deprived of a trial there, even under sanction of legislative action. If he applied for a change of venue, and it be granted on his request, it may very properly be said that he has waived the right, and no question can arise in reference to it. We do no think it was the purpose of the framers of the constitution to force a trial in a county where an impartial jury cannot be had, as to do so would defeat the greater and more important right of a speedy and public trial by an impartial jury. State v. Miller, 15 Minn. 344 (Gil. 277). Our statute is comprehensive enough to authorize the court to direct a change of venue when an impartial jury cannot be secured in the county where the offense is alleged to have been committed, and, limiting it to the impossibility of securing an impartial jury in that county, we think it is constitutional. It is not contended in this case that an actual necessity for the change did not exist when the order changing the venue was made. The only point of contention, under this head, is that the law authorizing the change was unconstitutional. The record clearly indicates that the trial court put the question of obtaining an impartial jury in Bradford county to actual test, and in such a case we do not conceive that the provision of our constitution was intended as a barrier against the change. The act of the legislature may and should have effect in so far as it does not conflict with the constitution, and to the extent of authorizing a change under circumstances disclosed in this case we are of opinion that there is no conflict. Care should, however, always be exercised to avoid any deprivation of the

right of the accused to his constitutional mode of trial in applications to change the venue without his consent.

The only other point presented is that Moss Hewitt could not, under our laws, be convicted as an accessory before the fact to murder in the second degree. We are of a contrary opinion. Our statute provides that "whoever counsels, hires or otherwise procures a felony to be committed, may be indicted and convicted as an accessory before the fact, either with the principal felon or after his conviction." § 2355, Rev. St. Murder in the second degree is a felony under our statute, and we have held that a party may be indicted and convicted of an assault with intent to commit this degree of homicide. Knight v. State, 42 Fla. 546, 28 South. 759. It was directly held in Jones v. State, 13 Tex. 168, 62 Am. Dec. 550, that murder in the second degree admits of accessories before the fact, and we are satisfied that such a ruling is correct, under our statutes.

Finding no error in the points presented, the judgment must be affirmed; and it is so ordered.

CHAPTER II.

PRELIMINARY PROCEEDINGS.

Interstate Extradition—Requisition of Governor—Writ of Habeas Corpus—Meaning of Fugitive from Justice.

ROBERTS v. REILLY.

116 U. S. 80, 6 Sup. Ct. 291. 1885.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

The record in this case shows the following state of facts: On April 30, 1885, the appellant, Roberts, presented his petition to the judge of the district court for the Southern district of Georgia, and filed the same in the office of the clerk, alleging that he was illegally restrained of his liberty by the appellee, Reilly, who claimed to be acting as an agent of the state of New York, and as such to hold the petitioner, under color of the authority of the United States, by virtue of an arrest made in pursuance of an executive warrant issued by the governor of Georgia, on a requisition from the governor of New York, reciting that the petitioner had been indicted in the state of New York, and was a fugitive from the justice of the latter state. He averred that the custody by which he was restrained of his liberty was illegal, for various reasons assigned, and prayed for the writ of habeas corpus. The writ was issued as prayed for, and duly served, and thereupon an amendment to the petition was filed, as follows: "And now comes the said William S. Roberts, and, by leave of the court first had, amends said petition, and says that he is restrained of his liberty, in violation of a law of the United States, viz., the act of February 12, 1793, (§ 5178 of the Revised Statutes of the United States,) in this: that it appears from the record, now here to your honor shown, upon which the executive warrant under which he is now restrained issued, that the crime with which he is charged was committed in the state of Georgia; that the papers accompany-

ing the demand of the governor of New York are not authenticated, as required by that act; that it nowhere appears that the relator was personally within the limits of the state of New York at the time when said alleged crime is stated to have been committed; that it nowhere appears that any evidence was before the governor of New York, at the time he issued his demand, that relator was personally within the limits of New York state when the crime is alleged to have been committed."

The defendant, Reilly, on May 2, 1885, filed his answer and return, under oath, to the writ of habeas corpus, which had been issued and served upon him, as follows:

"United States of America, Southern District of Georgia, Eastern Division: Pursuant to a writ of habeas corpus, issued by the Hon. Emory Speer, judge of the district court of the United States for the Southern district of Georgia, served upon me, I herewith produce the body of William S. Roberts, and return as the cause of his detention the executive warrant of the governor of the state of Georgia, under which he was delivered to me by authority issued to me by Hon. D. B. Hill, governor of the state of New York, April 22, 1885, here to the court shown, copy of which is annexed, under which I still hold him; I having, as agent of the state of New York, received said Roberts from Wilberforce Daniel, sheriff of the county of Richmond, to be carried to the state of New York, there to be dealt with according to law; that a certified copy of the indictment, found for grand larceny in the state of New York, with evidence of fleeing from justice after commission of the crime, were produced by respondent as received from the governor of New York and delivered to the governor of Georgia, and retained in his office at the time of the issuing of the executive warrant, under which the said Roberts was placed in possession of the respondent by the sheriff of Richmond county. I further return that on April 26, 1885, after the delivery of the said Roberts to me by the sheriff of Richmond county, I was served with a writ of habeas corpus issued by the Hon. H. C. Roney, judge of the superior court of the Augusta circuit, of which circuit the county of Richmond is a part, and by his order required to produce the said Roberts before him April 27, 1885; that from that date until May 1, 1885, I held the said Roberts subject to the order of the said judge, who at said time remanded him into

my custody; a certified copy of which proceedings, with the judgment thereon dismissing the writ and remanding him into my custody, is here to the court shown.

"Whereupon this respondent prays that the said writ may be dismissed at the costs of the relator."

On the hearing before the district court, documents were put in evidence, and constitute a part of the record, as follows:

(1) The authority given by the governor of New York to the respondent, as agent of the state, to take and receive the prisoner as a fugitive from justice, and convey him to the state of New York, to be dealt with according to law.

(2) A copy of the requisition of the governor of New York upon the governor of Georgia, as follows:

"State of New York, Executive Chamber.

"David B. Hill, Governor of the State of New York, to his Excellency the Governor of the State of Georgia: Whereas, it appears by a copy of an indictment, which I certify to be authentic, and duly authenticated in accordance with the laws of this state, that William S. Roberts stands charged with the crime of grand larceny in the first degree, committed in the county of New York, in this state, and it has been represented to me that he has fled from justice of this state, and may have taken refuge in the state of Georgia; now, therefore, pursuant to the provisions of the Constitution and laws of the United States in such cases made and provided, I do hereby require that the said William S. Roberts be apprehended and delivered to Philip Reilly, who is authorized to receive and convey him to the state of New York, there to be dealt with according to law.

"In witness whereof, I have hereunto signed my name, and affixed the privy seal of the State, at the city of Albany, this twenty-second day of April, A. D. 1885.

[Seal of the State of New York.] David B. Hill.

"By the Governor: William G. Rice, Private Secretary."

(3) A copy of the application for this requisition made by the district attorney of the county of New York, accompanied and supported by affidavits of William W. Thurston and others, giving in detail the circumstances of the alleged offense, and averring that the prisoner, and one Walton, charged with him,

had fled from the justice of the state of New York, and were to be found in Georgia.

(4) A copy of the indictment, as follows:

"Court of General Sessions of the Peace of the City and County of New York,

"The People of the State of New York against William S. Roberts and Edward H. Walton.

"The grand jury of the city and county of New York by this indictment accuse William S. Roberts and Edward H. Walton of the crime of grand larceny in the first degree, committed as follows: The said William S. Roberts and Edward H. Walton, each late of the First ward of the city of New York, in the county of New York aforesaid, on the fourteenth day of February, A. D. 1884, at the ward, city, and county aforesaid, with force and arms, ten written instruments and evidences of debt, to-wit, the bonds and written obligations issued by the Georgetown & Lane's Railroad Company, a corporation duly existing under the laws of the state of South Carolina, and called 'first mortgage bonds,' in and by each of which the said railroad company acknowledged itself indebted to the bearer thereof in the sum of one thousand dollars, and which said sum the said railroad company thereby promised to pay, on the first day of January, A. D. 1913, with interest, the same bearing date on the first day of January, A. D. 1883, and being then and there each duly signed by the president and secretary of the said railroad company, and sealed with the seal thereof, and numbered nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, and eighteen, respectively, and being then and there in full force and effect, and wholly unsatisfied, and of the value of one thousand dollars each, (a more particular description of which said bonds and written obligations is to the grand jury aforesaid unknown,) of the valuable things, evidences of debt, goods, chattels, and personal property of the Bethlehem Iron Company, then and there being found, then and there feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity.

"Randolph B. Martine, District Attorney."

Indorsed on back of indictment:

"Filed tenth day of April, 1885. The People v. William S. Roberts and Edward H. Walton. Grand larceny, 1st degree. §§ 528, 530, 540, Penal Code. Randolph B. Martine, District Attorney. Henry A. Oakley, Foreman.

"A true bill.

"Witnesses: W. W. Thurston.
"W. P. St. John."

The foregoing were certified by the secretary of the executive department of Georgia to constitute a true and complete transcript or copy of papers on file in that office in the matter of the requisition for William S. Roberts by the governor of New York upon the governor of Georgia.

(5) The executive warrant of the governor of Georgia, with the return of the execution thereof by the sheriff, as follows:

"State of Georgia, by Henry D. McDaniel, Governor of said State, to all the Sheriffs and Constables Thereof, Greeting: Whereas, his excellency, David B. Hill, governor of the state of New York, and as the executive authority thereof, has demanded of me, as the executive authority of this state, William S. Roberts, as a fugitive from justice from the state of New York, and has, moreover, produced a copy of indictment charging the said William S. Roberts with having committed, in the said state of New York, the crime of grand larceny in the first degree, which copy [of] indictment is duly certified as authentic by his excellency the governor of the state of New York, and has also appointed and commissioned Philip Reilly agent, on the part of the state of New York, to receive said fugitive from the civil authorities of this state, to the end that he may be carried to the state of New York, there to be dealt with according to law; and whereas, it is suspected that said fugitive from justice is now within the jurisdictional limits of this state: now, in accordance with the provisions of an act of congress passed the twelfth day of February, 1793, respecting 'fugitives from justice,' and in order that the said William S. Roberts may be brought to trial for the offense for which he stands charged, you are hereby commanded to arrest, and deliver him to the said Philip Reilly, agent as aforesaid, so that he may be carried to the state of New York, within whose jurisdiction said offense is alleged to have been committed; and I moreover charge and

require all officers, both civil and military, in this state, to be vigilant in endeavoring to apprehend the said William S. Roberts, fugitive as aforesaid.

"Given under my hand, and the seal of the executive department, at the capitol, in Atlanta, this twenty-fifth day of April, A. D. 1885, and of American Independence the one hundred and ninth.

[Seal.] "Henry D. McDaniel, Governor,
"By the Governor: Howard E. W. Palmer,
"Secretary Executive Department."

SHERIFF'S RETURN.

"Georgia, Richmond County.

"Executed the within warrant by arresting William S. Roberts, and delivering him, pursuant to the mandate of the governor, to Philip Reilly, agent on the part of the state of New York, at 1 p. m., April 26, 1885.

"W. Daniel, Sheriff, R. C., Ga."

* * * * * * * * * *

NOTE. The record of the proceedings upon the writ of habeas corpus is here omitted. The appellant's writ of habeas corpus was dismissed by the federal district court. Upon his appeal from such order to the circuit court, the order of dismissal of the writ was affirmed, and the appellant was remanded to the custody of the appellee. The appellant thereupon appealed from this decision to the Supreme Court.

MATTHEWS, J. * * * The other assignments of errors relate to the merits, and require a consideration of the limits of the jurisdiction of judicial tribunals in cases of the extradition of fugitives from justice under the clause of the Constitution by which it is regulated. That constitutional provision declares that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." Article 4, § 2, cl. 2. There is no express grant to congress of legislative power to execute this provision, and it is not, in its nature, self-executing;

but a contemporary construction contained in the act of 1793, 1 St. 302, ever since continued in force, and now embodied in §§ 5278 and 5279 of the Revised Statutes, has established the validity of its legislation on the subject. "This duty of providing by law," said Chief Justice Taney, delivering the opinion of the court in Kentucky v. Dennison, 24 How. 66, 104, "the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon congress; for, if it was left to the states, each state might require different proof to authenticate the judicial proceeding upon which the demand was founded; and as the duty of the governor of the state, where the fugitive was found, is, in such cases, merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual, without a law of the state or of congress to authorize it."

It follows, however, that whenever the executive of the state, upon whom such a demand has been made, by virtue of his warrant, causes the arrest, for delivery, of a person charged as a fugitive from the justice of another state, the prisoner is held in custody only under color of authority derived from the Constitution and laws of the United States, and is entitled to invoke the judgment of the judicial tribunals, whether of the state or the United States, by the writ of habeas corpus, upon the lawfulness of his arrest and imprisonment. The jurisdiction of the courts of the states is not excluded in such cases; as was adjudged by this court in the case of Robb v. Connolly, 111 U. S. 624; S. C. 4 Sup. Ct. Rep. 544; for although the party is restrained of his liberty under color of authority derived from the laws of the United States, he is not in the custody of, or under restraint by, an officer of the United States.

The act of congress (§ 5178, Rev. St.) makes it the duty of the executive authority of the state to which such person has fled to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any state demands such person as a fugitive from justice, and produces a copy of an indictment found, or affidavit made, before a magistrate of any state, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate of the state from whence the person so charged has fled. It must

appear, therefore to the governor of the state to whom such a demand is presented, before he can lawfully comply with it—First, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the state making the demand; and, second, that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand.

The first of these prerequisites is a question of law, and is always open, upon the face of the papers, to judicial inquiry, on an application for a discharge under a writ of habeas corpus. The second is a question of fact, which the governor of the state upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court.

It is conceded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof. Ex parte Reggel, 114 U. S. 642; S. C. 5 Sup. Ct. Rep. 1148. Further than that it is not necessary to go into the present case.

The objections taken in this proceeding to the sufficiency of the indictment, which were overruled both in the district and circuit courts, and which are still relied on here, are not well founded. The indictment itself is certified by the governor of New York to be authentic and to be duly authenticated, which is all that is required by the act of congress. It charges a crime under and against the laws of that state. It is immaterial that it does not appear that a certified copy of such laws was furnished to the governor of Georgia. The statute does not require it; and the governor could have insisted, and it is to be presumed did insist, upon the production of whatever he deemed necessary or important properly to inform him on the subject. And the courts of the United States, to whose process the

relator has appealed, take judicial notice of the laws of all the states.

The indictment in question sufficiently charges the substance of a crime against the laws of New York. The objection to it, that it does not appear that the Bethlehem Iron Company, averred to be the owner of the property the subject of the larceny charged, is a person capable in law of such ownership, is not matter of law arising upon the face of the indictment, but can arise only at the trial upon the evidence, if the question should then be raised. The averment in the indictment is the allegation of a fact which does not seem to be impossible in law, and is therefore traversable. The further objection that the facts and circumstances set out in the affidavits as constituting the crime charged in the indictment show that it is a crime in Georgia, and the possible subject of prosecution in that state under its laws, does not affect the question. These facts are, in brief, that the original taking of the bonds mentioned in the indictment is shown to have been in Georgia, whence they were brought into New York by the appellant, and there finally appropriated to his own use. If that be true, it is none the less true that the offense charged is also a crime in New York against its laws, and the state of Georgia may choose to waive the exercise of its jurisdiction by surrendering the fugitive to answer to the laws of New York.

On the question of fact whether the appellant was a fugitive from the justice of the state of New York, there was direct and positive proof before the governor of Georgia, forming part of the record in this proceeding. There is no other evidence in the record which contradicts it. The appellant in his affidavit does not deny that he was in the state of New York about the date of the day laid in the indictment when the offense is alleged to have been committed, and states, by way of inference only, that he was not in that state on that very day; and the fact that he has not been within the state since the finding of the indictment is irrelevant and immaterial. To be a fugitive from justice, in the sense of the act of congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution, anticipated or begun, but simply that, having

within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another.

We find no error in the judgment of the circuit court and the same is affirmed; and it is directed that the order and judgment of the district court remanding the appellant to the custody of the respondent as the agent of the state of New York be executed.

CHAPTER III.

INDICTMENTS AND INFORMATIONS.

Indictments—Necessity of Specifying Particular Offense—Setting Out Statutory Offenses—Intent Necessary in Attempts—Arrest of Judgment.

STATE v. DORAN.

99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278. 1904.

Exceptions from Supreme Judicial Court, York County.

John Doran was indicted for attempting to break and enter a certain car of the Boston & Maine Railroad "for the purpose of committing a felony," and upon trial was found guilty. Thereupon he moved in arrest of judgment. The motion was overruled, and the defendant excepted. Exceptions sustained.

Argued before Wiswell, C. J., and Whitehouse, Strout, Savage, Peabody, and Spear, JJ.

WHITEHOUSE, J. It is alleged in the indictment that the defendant, "with force and arms, the car numbered 18,656 of the Boston & Maine Railroad * * * feloniously, willfully, and maliciously did attempt to break and enter for the purpose of committing a felony." The jury returned a verdict of guilty, and the defendant moved in arrest of judgment; among other reasons, "because no specific offense against the laws of this state is alleged against the said Doran in said indictment, and that no judgment could be rendered upon the verdict in said court." The motion was overruled by the presiding judge, and the case comes to this court on exceptions to this ruling.

The indictment appears to be founded on § 9 of chapter 132, Rev. St., relating to "attempts to commit offenses," and § 8 of chapter 120, Rev. St., descriptive of the offense which the defendant was charged with attempting to commit. § 9 of chapter 132 provides that "whoever attempts to commit an offense, and does anything towards it, but fails, or is interrupted

or prevented in its execution," shall be punished as therein provided; and § 8 of chapter 120 declares that "whoever, with intent to commit a felony, breaks and enters a * * * railroad car of any kind, or building in which valuable things are kept," shall suffer the penalty therein specified.

It appears from a comparison of these provisions with the language of the indictment that only the general terms of the statute have been employed to state the charge against the defendant, both with respect to the "attempt" to commit the offense and the "felony" which he intended to commit. The indictment contains neither a description of the overt act done by the accused in attempting to commit the crime charged, nor a specification of the particular felony which the defendant is charged with attempting to commit after breaking and entering the car.

Where the offense is created by statute, and the facts constituting it are fully set out, it is undoubtedly sufficient to charge the offense in the language of the statute without further description. 1 Bish. Cr. Proc., § 611. But "in all criminal prosecutions the accused shall have a right * * * to demand the nature and cause of the accusation." Const. Me. art. 1, § 6. He has a right to insist that the facts alleged to constitute a crime shall be stated in the indictment against him with that reasonable degree of fullness, certainty, and precision requisite to enable him to meet the exact charge against him, and to plead any judgment which may be rendered upon it in bar of a subsequent prosecution for the same offense. Hence, if a statute creating an offense fails to set out the facts constituting it sufficiently to apprise the accused of the precise nature of the charge against him, a more particular statement of the facts will be required in the indictment. "And where a more generic term is used, or where the words of the statute by their generality may embrace cases which fall within the terms but not within the spirit or meaning thereof, the specific facts must be alleged to bring the defendant precisely within the inhibition of the law." Enc. of Pl. and Prac., vol. 10, p. 487; Wharton's Cr. Pl. and Prac., § 220. Indeed, it is an elementary rule of criminal pleading that every fact or circumstance which is a necessary ingredient in a prima facie case of guilt must be set out in the indictment.

With respect to indictments for attempts to commit offenses Mr. Bishop says: "An attempt is an intent to do a particular criminal thing with an act towards it falling short of the thing intended [1 Bish. Cr. Law, § 728], and on principle we see that we must set out the act which was committed and the specific intent which accompanied it." Bish. on Stat. Cr., § 394; 2 Crim. Proc., §§ 1, 92; Directions and Forms, § 100. In 2 Wharton's Crim. Law the author says: "Attempt is a term peculiarly indefinite. It has no prescribed legal meaning. It relates from its nature to unconsummated offenses. * * * Attempts may be merely in conception or in preparation, with no causal connection between the attempt and any particular crime. * * * In an indictment for an attempt it is essential to aver that the defendant did some act which, directed by a particular intent, which must be averred, would have apparently resulted in the ordinary and likely course of things in a particular crime." §§ 2703, 2705. To constitute an attempt, there must be something more than mere intention or preparation. There must be some act moving directly towards the commission of the offense after the preparations are made. People v. Youngs, 122 Mich. 292, 81 N. W. 114, 80 Am. St. Rep. 582. "An indictment for an attempt to commit burglary must not only allege the attempt and intent, but it is essential that it also allege the overt acts relied upon as constituting the attempt." Cyc. of Law and Proc., vol. 6, p. 225. See, also, Encyc. Pl. and Prac., vol. 3, p. 799, and cases cited.

Again, as already noted, the indictment fails to specify the particular felony which it is alleged the defendant intended to commit. This is another fatal defect. The word "felony" is not the name of any distinctive offense. It is a generic term, employed to distinguish certain high crimes, as murder, robbery, rape, arson, and larceny, from other minor ones, known as "misdemeanors." The averment that the defendant broke and entered the car for the purpose of committing a felony wholly failed to apprise him of the specific offense which it is claimed he intended to commit. Whether it would be contended by the state that he intended to commit murder, or robbery, or rape, or larceny, he is not informed. Upon the trial of such an indictment he was liable to be oppressed by the introduction of evidence which he could not anticipate or be prepared to meet.

The authorities are substantially unanimous in support of the proposition that such an allegation is wanting in the precision and certainty required by the Constitution and the rules of criminal pleading. "Though in burglary and statutory housebreaking the intent, as defined by the law, is simply to commit a felony, it is not sufficient in the indictment to follow these general words, but the particular felony intended must be specified." Bish. Cr. Proc. 1, § 527, and 2, § 142. See, also, Encyc. Pl. and Prac., vol. 3, p. 772, and 6 Cyc. Law and Proc. 217, tit. "Burglary," and cases cited; Wharton's Cr. Pl. and Prac., § 163a.

But while all the authorities substantially agree that it is necessary, in order that the charge may be certain, to specify the particular felony intended, they are not in harmony respecting the degree of particularity required in setting out the specific offense. According to the great weight of authority, however, as well as upon sound reason, the ulterior felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of such felony. 2 Bish. Cr. Proc., § 142. It is ordinarily sufficient to state the intended offense generally, as by alleging an intent to steal, or commit the crime of larceny, rape, or arson. Such is the rule in Massachusetts. In Com. v. Doherty, 10 Cush. 55, the court say: "From the very nature of the case in many instances the charge in its formal details could not be given. Suppose the alleged intent were to commit larceny, but of what particular goods, or the property of what particular individual, it could not be known unless the theft was actually perpetrated. A general intent to steal goods would complete the offense, and the averment of such intent, without more, is sufficient." Josslyn v. Com., 6 Metc. 239. Nor is it necessary, under our statutes, in the case of an alleged intention to commit larceny, to aver that the property intended to be stolen exceeded $100 in value. By § 1 of chapter 121, Rev. St., the larceny of property less than $100 in value is punishable by "imprisonment for not more than two years," and is therefore a felony under our statutes. By § 10 of chapter 132 and § 3 of chapter 136, Rev. St., the term "felony" is made to include every offense "punishable by imprisonment" "for the term of one year or more." See State v. Goddard, 69 Me. 181.

The indictment being clearly insufficient for the reasons above set forth under the third specification contained in the defendant's motion, it is unnecessary to consider the causes assigned in the first and second specifications.

Exceptions sustained. Motion sustained. Judgment arrested.

Indictments—Sufficiency—Inconsistent Allegations.

STATE v. LOCKWOOD.

119 Mo. 463, 24 S. W. 1015. 1894.

Appeal from circuit court, Henry county; James H. Lay, Judge.

Albert L. Lockwood was indicted for manslaughter. A motion to quash was sustained, and the state appeals. Affirmed.

BURBESS, J. At the September term, 1893, of the circuit court of Henry county, an indictment was returned by the grand jury of said county against the defendant, which, omitting the formal parts, is as follows: "That Albert Lockwood, on the 31st day of July, 1892, at the county of Henry, and state of Missouri, in and upon one Robert McAllister, then and there being, feloniously, willfully, and with culpable negligence did make an assault, and with a dangerous and deadly weapon, to wit, a pistol, then and there loaded with gunpowder and leaden balls, which he, the said Albert Lockwood, then and there in his right hand had and held at and against him, the said Robert McAllister, did then and there feloniously and willfully and with culpable negligence, shoot off and discharge, and with the pistol aforesaid, and the leaden balls aforesaid, then and there feloniously, willfully, and with culpable negligence did shoot and strike him, the said Robert McAllister, in and upon the front part of the head, and just above the left eye, of him, the said Robert McAllister, giving him, the said Robert McAllister, then and there, with the dangerous and deadly weapon, to wit, the pistol aforesaid, and the gunpowder and leaden balls aforesaid, in and upon the front part of the head, and just above the left eye, of him, the said Robert McAllister, one mortal wound of the breadth of one inch and of the depth of four inches, of which said mortal wound the said Robert McAllister then and there,

on the said 31st day of July, 1892, at the county aforesaid, died; and so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Albert Lockwood, him, the said Robert McAllister, in the manner and by the means aforesaid, willfully and with culpable negligence did kill and murder, against the peace and dignity of the state." At the May term, 1893, the defendant filed his motion to quash, which is as follows: "Because it charges a willful or intentional killing and an involuntary killing in the same count. Because said indictment is evidently intended to be drawn for manslaughter in the fourth degree, and for an involuntary killing as a result of culpable negligence, and there could be no willful killing under said indictment. (3) Because said indictment charges or attempts to charge both an intentional and an unintentional killing." Which said motion was by the court sustained, to which action the state, by its prosecuting officer, duly excepted. After unsuccessful motion in arrest, the state perfected its appeal.

The insistence on the part of the state is that, although the indictment is for involuntary manslaughter, the word "willful," where used in it, is merely surplusage, and may be disregarded. Rev. St. § 3477, under which the indictment was drawn, is as follows: "Every other killing of a human being by the act, procurement or culpable negligence of another, which would be manslaughter at the common law, and which is not excusable or justifiable, or is not declared in this chapter to be manslaughter in some other degree, shall be manslaughter in the fourth degree." Mr. Wharton, in his work on Homicide (§ 5), says: "Manslaughter, at common law, is of two kinds: (1) Voluntary manslaughter, which is the unlawful killing of another, without malice, on sudden quarrel or in heat of passion. Where, upon sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter; and so if they, upon such occasion, go out and fight in a field; for this is one continued act of passion. So, also, if a man be provoked by any gross indignity, and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide, not being se defendendo. In these and such like cases the law, appreciating the infirmities of human nature, extenuates the offense committed, and mercifully hesitates to put on the same footing of guilt the cool deliberate act and the result of hasty passion."

§ 6: "Involuntary manslaughter, according to the old writers, is when death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part, not amounting to felony, or from a lawful act negligently performed. Hence it is manslaughter when the death of another occurs through the defendant's negligent use of dangerous agencies, and so when death incidently, but unintentionally, results in the execution of a trespass." "Involuntary manslaughter is the accidental killing of a human being in the prosecution of some unlawful act not felonious, or in the improper performance of some lawful act, (State v. Benham, 23 Iowa 154; State v. Zellers, 7 N. J. Law 220; 4 Bl. Comm. 192; 1 East, P. C. 255;) as where an act not strictly lawful is done in an unlawful manner, and without due caution, (Lee v. State, 1 Coldw. 62;) or killing accidentally in the unlawful and negligent use of firearms without mischievous intent," (Desty, Crim. Law, 128; State v. Emery, 78 Mo. 77). The question under consideration is not as to whether the defendant might not be convicted of involuntary manslaughter, under § 3477, supra, under a proper indictment for manslaughter, or other homicide of higher degree, for such is the well-settled law of this state; but is as to the sufficiency of the indictment in this case. If the killing was "willful," as charged in the indictment, then it could not have been accidental, or by "culpable negligence." The terms are inconsistent, as they cannot both be true. If the killing was by "culpable negligence," then it was not "intentional." The word "willful" has as much significance as have the words "culpable negligence," and we have the same right to say the latter are mere surplusage as we have the right to say the word "willful" is. The indictment we think insufficient in law, and the court did not err in sustaining the motion to quash it. Judgment affirmed. All concur.

CHAPTER V.

THE TRIAL.

Evidence—Necessity of Proving the Corpus Delicti.

HARRIS v. STATE.

28 Tex. App. 308, 12 S. W. 1102, 19 Am. St. Rep. 837. 1889.

Appeal from district court, Walker county; N. G. Kittrell, Judge.

WHITE, P. J. Appellant has been convicted of the murder of her infant babe, and her punishment has been assessed at a life term in the penitentiary. We are of opinion that the evidence establishing the corpus delicti is not sufficient to sustain the judgment, in so far as the same is made to appear in the record here before us. To warrant a conviction it was necessary for the state to prove that the child was born alive; that it had an existence independent of the mother; and that afterwards its life was destroyed by the act, agency, or procurement of its mother, this defendant. Wallace v. State, 7 Tex. App. 570, 10 Tex. App. 255; Sheppard v. State, 17 Tex. App. 74. Defendant confessed that the child was born on Sunday night; that it was born alive; that she put it into Dr. Baldwin's spring; and that it was alive when she put it in the spring. The child was found the following Wednesday. Now, if the defendant's confessions were sufficient by themselves, perhaps we might hold that the corpus delicti had been sufficiently proved. These, however, in and of themselves, are not sufficient. The corpus delicti consists not merely of an objective crime, but of the defendant's agency of the crime; and it is well settled that, unless the corpus delicti in both these respects is proved, a confession is not by itself enough to sustain a conviction. It must be corroborated. This can seldom be done by direct or positive testimony, but it may as well be shown by circumstantial evidence. Willard v. State, 27 Tex. App. 386, 11 S. W. Rep. 453. Now, what was the cor-

roboration in this case? The doctor who testified as an expert says: "I cannot say positively whether the child was ever alive, or whether it had ever breathed." He dissected the child's head, and found that the skull had not been fractured. He took out the lung, and applied the hydrostatic test, and found air in it,—the usually accepted test that it had breathed. This was sufficient corroboration as to the fact that the child was born alive. Concede that the child had been born alive. Was it killed, or was it drowned? Evidently the doctor does not think it was killed by violence. As to the chances and probabilities that it had been drowned, he does not say one word. Why did not he make an examination, and give his opinion as to the fact of drowning? What evidence of drowning is there outside the confession? Was the child found in Dr. Baldwin's spring? If so, who found it there, and under what circumstances? Was Dr. Baldwin's spring of sufficient depth to drown the child? Was the spring in a public or secluded place? All these facts might have been testified to, and yet the record contains no such evidence. The first it discloses of the body is that somebody had found it, and it was under a box near the spring. Who found it in and took it out of the spring? Before we are asked to sanction so serious a verdict and judgment, even on the confession of a defendant, there ought to be furnished us some circumstances tending to corroborate that confession, since the law will not permit a conviction to stand alone upon the confession. In this case, because the evidence is insufficient to establish the corpus delicti, the judgment is reversed, and the cause is remanded.

Verdict—Surplusage—Void Sentence.

EX PARTE BURDEN.

92 Miss. 14, 45 So. 1, 131 Am. St. Rep. 511. 1907.

Appeal from circuit court, Hinds county; G. G. Lyell, Chancellor.

Habeas corpus by Chester Burden. From a decree admitting him to bail, the state appeals. Affirmed.

The relator was indicted by the grand jury for assault "with intent and in the attempt * * * to kill and murder." The

jury returned a verdict of guilty of "assault and battery with intent to commit manslaughter." The circuit judge thereupon sentenced the relator to a term in the penitentiary, treating the verdict as a conviction of a felony. The relator then took an appeal to the supreme court, and, pending this appeal, sued out a writ of habeas corpus before the chancellor in vacation, alleging that the conviction was a nullity, or at most was a conviction of assault and battery, and that therefore he was entitled to bail pending the appeal. The chancellor adopted the latter view, and admitted the relator to bail.

WHITFIELD, C. J. The verdict in this case was in the following words: "We, the jury, find the defendant guilty of assault and battery with intent to commit manslaughter." Under the case of Traube v. State, 56 Miss. 153, this has been determined to be a mere conviction of assault and battery; the words "with intent to commit manslaughter" being mere surplusage. We have, therefore, a conviction for a misdemeanor. The learned circuit judge, misinterpreting this verdict, held it to be a conviction for a felony, and sentenced the defendant to six years in the penitentiary. This sentence he had no power or jurisdiction to impose. The distinction, abundantly established by authority, is between a sentence which is merely excessive or erroneous, regard being had to the particular offense, and a sentence which is absolutely void. In the former case the writ of habeas corpus cannot be availed of, but the party must appeal; else the writ of habeas corpus would be made to serve the office intended exclusively for an appeal. This last point, and this alone, is what was held in the case of Ex parte Grubbs, 79 Miss. 358, 30 South. 708. That was no case of excessive sentence for any offense. The sole complaint by Grubbs, on habeas corpus, was that the affidavits on which he had been convicted were defective. Of course, the writ of habeas corpus could not be resorted to to try that question. It is no authority whatever on the point in issue here. The true doctrine is laid down explicitly in 21 Cyc., at page 296, where it is said: "Want of jurisdiction over person or subject-matter is always a ground for relief on habeas corpus, for, if the court has acted without jurisdiction, its judgment or order is absolutely void, even on collateral attack; and at least according to the doctrine

of the latter cases, in addition to jurisdiction over person and subject-matter, the court must have had jurisdiction to render the particular judgment"—citing innumerable authorities from all over the Union, including Scott v. State, 70 Miss. 247, 11 South. 657, 35 Am. St. Rep. 649, which is directly in point and decisive here. At page 298 of the same authority is laid down the universal doctrine that "mere errors and irregularities which do not render the proceeding void are not ground for relief by habeas corpus. In such case, if the judgment is one from which appeal lies, the remedy is by appeal." The rule is thus clearly laid down in 21 Cyc., at page 294: "But from this it does not follow that the only question which can be inquired into is the jurisdiction of the court over person and subject-matter; but, in addition, the court must, at least according to the latter cases, have had jurisdiction to render the particular judgment, without which its judgment is void and the prisoner entitled to be discharged"—citing numerous authorities. Notice that it is expressly said this is the holding of the latest cases. Again, the rule is thus expressed in 15 A. & E. Ency. of Law (2d Ed.), p. 270, that: "Even where a court has jurisdiction of the offense charged and of the person of the accused, it may so far transcend its powers in assessing the penalty for the offense, by imposing a punishment of a character different from that prescribed by law, or otherwise, that the sentence will be void and furnish no authority for holding the accused in custody, though the conviction on which the sentence was entered was valid and correct; and in such a case the accused may be discharged on habeas corpus. But it is only when the court pronounces a judgment which is not authorized by law under any circumstances in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void, so as to justify the discharge of the defendant held in custody by it, and a judgment is not considered void, according to what seems to be the preponderance of authority, merely because it is excessive, if it is of the kind or character authorized by law, though it has been said that an excessive judgment is one that the court did not have the power to render, and is therefore void. The discharge, however, in case a void sentence has been entered on a valid conviction, should be without prejudice to the right of the prosecution to have the prisoner

sentenced according to law, unless the case is such that the prisoner cannot be remanded for resentence."

In the case of a judgment or sentence which is merely excessive, it seems to be well settled that, "if the court was one of general jurisdiction, such judgment or sentence is not void ab initio because of the excess, but that it is good so far as the power of the court extends, and is invalid only as to the excess, and therefore that a person in custody under such a sentence cannot be discharged on habeas corpus until he has suffered or performed so much of it as it was within the power of the court to impose. This condition exists whenever the punishment imposed is of the nature or kind prescribed by law and merely exceeds the quantity authorized, as where the offender is sentenced to a longer term of imprisonment than is prescribed for the particular offense," etc. It will be especially noted that both Cyc. and A. & E. Ency. of Law declare it to be the modern rule, according to the latest and best-considered cases, that, although the court may have jurisdiction over the subject-matter and over the person, it is without jurisdiction to impose a sentence not appropriate to the kind and nature of the offense. The language used in the Ency. is: "This condition exists [i. e., habeas corpus cannot be resorted to] whenever the punishment is of the nature or kind prescribed by law and merely exceeds the quantity authorized." And again the same authority says, on page 170, that, "even where a court has jurisdiction of the offense charged and of the person of the accused, it may so far transcend its powers in assessing the penalty for the offense by imposing a punishment of a character different from that prescribed by law, or otherwise, that the sentence will be void and furnish no authority for holding the accused in custody, though the conviction on which the sentence was entered was valid and correct; and in such a case the accused may be discharged on habeas corpus." Again, in the latter part of the same section, it says: "The court, to have power to render the particular judgment, must impose a punishment of the kind or character authorized by law." This is the true test, the correct distinction. The same doctrine is declared in Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914, and Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. Ed. 872, both of which are approved in McHenry v. State (Miss.) 44 South. 831.

We refer to but two other cases. In the case of In re Fanton, 55 Neb. 703, 76 N. W. 447, 70 Am. St. Rep. 422, it is said: "If, upon a conviction for burglary, the court should sentence the accused to be hung, the judgment would be void for want of jurisdiction of the court to impose a sentence of that kind in that case. But it would be otherwise if the court should adjudge an imprisonment in the penitentiary for a longer period than fixed by the statute for the crime of burglary. In the latter case the sentence would be erroneous merely, but not void. In the one case the court had no jurisdiction to impose that particular kind of a sentence upon conviction of burglary, while in the other the statutory kind of punishment was meted out, although the time of imprisonment exceeded the statutory bounds. A sentence of a different character than that authorized by law to be imposed for the crime of which the accused has been found guilty is void, while a sentence which imposes the statutory kind of punishment is not absolutely void, although excessive. In the former case the entire judgment is invalid, while as to the latter the excessive portion alone is erroneous, and not void in such a sense as to be available on habeas corpus, at least until after the valid portion of the judgment has been executed." This is a very precise statement of the true distinction. In the last case we cite In re John Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149. That great judge, Mr. Justice Field, speaking for the court in a case where the defendant was convicted of a crime for which he could not be imprisoned in the penitentiary at all, just as here, after a very able discussion of the whole subject-matter, says: "The prisoner is ordered to be confined in the penitentiary, where the law does not allow the court to send him for a single hour. To deny the right of habeas corpus in such a case is a virtual suspension of it; and it should be constantly borne in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source, equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals"—and the prisoner was discharged on the writ of habeas corpus, but held to answer further according to law; that is, to appear before the lower court to receive proper sentence. These statements of this elementary principle are clear and accurate, and no other authorities than those referred to in the text are neces-

sary. Wherever the sentence pronounced by the circuit judge is merely excessive, or erroneous, or irregular, the writ of habeas corpus has no place, but the defendant must appeal; but wherever the sentence imposed by the circuit judge for the particular offense of which the defendant has been found guilty by the jury is void for want of power to pronounce that particular sentence, such sentence is absolutely void, and the defendant may resort to the writ of habeas corpus to release him from confinement in pursuance of such illegal sentence.

Here we have the case of a man convicted of a misdemeanor and under sentence as for a felony. Most manifestly the sentence is void absolutely, as one which the court was without power under the law to pronounce at all. It is not correct to say that, if the circuit judge interpreted this verdict to be a verdict of guilty of a felony, he was under the duty to sentence as for a felony. Whether the defendant was convicted of a misdemeanor or a felony as a matter of fact is the test as to the sentence to be imposed; not what interpretation, right or wrong, the circuit judge may have put on the verdict. The question is, what was the defendant convicted of by this verdict? and the answer is plain, "Of simple assault and battery," and that is a mere misdemeanor. How, then, could the circuit judge impose the penalty of six years' imprisonment in the penitentiary on a defendant convicted of mere assault and battery? It is manifest that his judgment was absolutely void. The argument that habeas corpus does not lie to correct a merely excessive sentence is sound enough; but the sentence must always be one proper for a misdemeanor where the conviction is of a misdemeanor, and one proper for felony where the conviction is of a felony, else we would introduce interminable confusion into the law. If in this case, for example, the circuit judge, treating this judgment, as he should have treated it, as a conviction of simple assault and battery, had imposed an excessive sentence as for a misdemeanor, we would have had the case of a merely excessive or irregular or erroneous sentence; but, when he undertook to impose upon the defendant a felony sentence for a conviction for misdemeanor, it becomes perfectly clear that he imposed a sentence which he was without power or jurisdiction to impose. The one would have been a mere irregular exercise of power; the other the exercise of a power

he was wholly without, since in no possible case could he have imposed a felony sentence for a mere misdemeanor.

One other observation is due to be made, however, in this case, and that is, since this verdict is not a nullity, but was a good verdict for assault and battery, the relator should not be discharged, but should be remanded to the circuit court for proper sentence as for assault and battery. See 21 Cyc. p. 306, par. 15, where it is said, citing authorities: "The court may also have jurisdiction to commit a party on one ground, but not on another, and may nevertheless commit him on both grounds; and in such case the prisoner ought not to be discharged so long as he is properly imprisoned under the valid portion of the commitment."

The decree is affirmed.

MAYES, J. dissents.

LEADING ILLUSTRATIVE CASES LAW OF PERSONS AND DOMESTIC RELATIONS

PART I

PARENT AND CHILD

CHAPTER I.

PARENT'S RIGHTS AND DUTIES.

Parent's Obligation to Support Child.

HUKE v. HUKE.

44 Mo. App. 308. 1891.

THOMPSON, J. This action is brought by a daughter, seventeen years of age, by her next friend, against her father for support and maintenance. The circuit court sustained a demurrer to the petition, and the plaintiff prosecutes this appeal. The petition is as follows:

"Your petitioner, Frieda Huke, by Thomas P. Bashaw, her next friend herein appointed, respectfully represents and shows: That petitioner is a resident of the city of St. Louis, state of Missouri, aged seventeen years, and the daughter of defendant, William Huke, by Amelia Huke, his wife, who died in said city of St. Louis on the thirteenth day of November, 1888; that continuously from her birth, until the date hereinafter mentioned, petitioner resided with and remained under the guardianship and control of her father, said William Huke, and dependent upon him for her support, for necessaries and for mental and moral training and education; that, on or about the first day of

July, 1890, petitioner's father, said William Huke, forcibly by commands, threats and duress, compelled petitioner to depart from and to leave his house and home without money or means or provision for her subsistence, and has continuously since failed, neglected and refused to resume exercise or perform any of his duties as her parent and natural and legal guardian, and has utterly and wholly renounced and abandoned all his said duties, and has failed, neglected and refused to make provision, or to supply any money or means, for petitioner's care, custody and guardianship, for her support, for her necessaries, or for her mental and moral training and education; that for many years last past defendant, William Huke, has been, and is, the owner of a large amount of property, and engaged in prosecuting an extensive and profitable business in said city of St. Louis, and possessed of a large income, and is well able financially to make provision for petitioner's needs in the premises; that petitioner is wholly destitute, has no funds, property or resources of any kind, that by reason of her youth, sex and lack of education and experience, she has been and is unable to secure employment or to earn the means of subsistence; that she is without a home, and that she has no abiding place, food or raiment, save such as are bestowed upon her in friendship and charity; that she is without means or provision, or hope of obtaining same, for the furtherance of her mental and moral training and education; that, for her relief, she has incurred debts and obligations beyond her capacity to pay, and her credit is now exhausted; that the petitioner is wholly without hope or prospect of relief, and without remedy at law, or any remedy whatsoever, save through the intervention of this honorable court in enforcing against her father, said William Huke, petitioner's right to a just, adequate and suitable provision for her wants in the premises. Wherefore, petitioner, by Thomas P. Bashaw, her next friend aforesaid, prays this honorable court to grant herein its order and command to said William Huke, requiring and directing him to appear before this court at a time in said order to be stated, then and there to show cause, if any there be, why he should not be ordered, directed and required by this honorable court to furnish and pay over, pendente lite, and from time to time, the necessary funds and means for the supplying of petitioner's wants in the premises during the remainder of her minority,

and for her necessary cost and expenses herein, and further to show cause, why this honorable court should not appoint in that behalf a suitable person to act under the orders and direction of the court as petitioner's acting guardian in the premises; and petitioner further prays the court, through Thomas P. Bashaw, her next friend aforesaid, that upon the return to said order, and upon the final hearing hereof, this honorable court may by order and decree herein order, direct and require said William Huke to furnish and pay over, pendente lite, and from time to time, the necessary funds and means for the supplying of petitioner's wants in the premises during the remainder of her minority for her support, for necessaries, mental and moral training and education, for her costs and expenses herein, and that this honorable court may, for the accomplishment of such purposes, nominate and appoint a suitable person to act pendente lite, and until petitioner attains her majority, under the orders and direction of this honorable court, in receiving such funds and means from said William Huke, and applying same for the purposes aforesaid for the benefit of petitioner, and for such other and further relief as may seem meet and proper and within the powers of this honorable court."

This action proceeds in the face of elementary principles. By the common law of England a father is bound to support his infant child in the sense that the obligation has any legal sanction; no action can be maintained against him, without the aid of statute, to compel him to discharge this natural duty. By that law a father is not liable as upon an implied contract, to a stranger who furnishes necessities for the support of his infant child. Urmston v. Newcomen, 4 Ad. & El. 899; Mortimore v. Wright, 6 Mees. & W. 482; Seaborne v. Maddy, 9 Car. & P. 497; Hodges v. Hodges, Peake, Ad. Cas. 79. On this point many of the American courts follow the English rule, but some of them have departed from it and adopted the more humane principle, that the moral obligation of the father to support his infant child is sufficient to raise an implied promise to pay for necessaries furnished to a child by a stranger. See, for instance, Gotts v. Clark, 78 Ill. 229; Hunt v. Thompson, 3 Scam. (Ill.) 179; 36 Am. Dec. 588. I have looked through our Missouri cases without satisfying myself what the state of our law is on this question of the father's liability for necessaries. But the

intimations of those cases are such that we may concede that, under our law, a father is liable to a stranger for necessaries furnished to his infant child. Rogers v. Turner, 59 Mo. 116; St. Ferdinand Academy v. Bobb, 52 Mo. 357; Girls' Home v. Fritchey, 10 Mo. App. 344. And yet it does not follow that such an action as the present will lie.

No instance is found in the books, where such an action as the present has been maintained, either at law or in equity. At one period in our English history a statute was enacted that, if any popish parent should refuse to allow his Protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor should, by order of the court, constrain him to do what is just and reasonable. Stat. 11 & 12 Wm. III, c. 4. The very enactment of this statute,—the necessity in the state of the law for such a statute,—shows that a father was under no compulsory obligation at common law, or by the principles of equity, to support his infant child. A case arose after the passing of this statute, making this conclusion still more clear. The daughter of a wealthy Jew had embraced christianity, and he turned her out of doors. On the petition of the parish for relief against him, they were held entitled to none, because it was not alleged that she was poor or likely to become chargeable. Inhabitants of St. Andrews Parish v. Mendzes de Breta, 1 Ld. Raym. 699. This gave occasion for another statute, which ordained that, if Jewish parents should refuse to allow their Protestant children a fitting maintenance, suitable to the fortune of the parents, the lord chancellor, on complaint, might make such order as he should see proper. Stat. 1 Anne, c. 30; 1 Bla. Com. 449.

But it is suggested, in argument, that this petition is addressed to the chancery powers of the circuit court, and that the chancellor of England had, in virtue of a delegated authority from the king as parens patriae, or, as was sometimes said, the father of the fatherless, a power to require a father, having the means, to set apart a fund for the support of his indigent minor child. That court has again and again asserted a species of vice-regal power over the custody and education of children, in virtue of a delegated authority from the king as parens patriae. But the extent to which the court has gone in the exercise of this power has been to make orders disposing of the custody of infant

children, and directing a scheme of education out of their own property, when they had property out of which such a scheme could be directed. At one time there was considerable opinion to the effect, that the jurisdiction of chancery in this regard rested upon property; and, therefore, it was a common practice for some relative of a child, desiring to obtain an order of chancery, taking the child away from the father for misconduct of the latter, to settle upon the child a certain amount of property. But it was finally settled that the jurisdiction did not rest on property, In re Spence, 2 Phil. 247; In re Flynn, 2 De Gex & Sm. 457, 481; though the chancellors often refused to exercise it in cases where the infant had no property, because, without the aid of property, it could not be conveniently and beneficially exercised. In re Flynn, supra.

In the exercise of that jurisdiction it will appear that the English court of chancery went so far as to level orders and decrees against parents and guardians residing in foreign countries—in France and America, and that it stood ready to enforce those decrees by imprisoning the defendants in the Fleet, whenever they should set their feet upon the soil in England—a jurisdiction which, it may be assumed, no American court would dare to exercise. But, while thus attempting a tyrannical and extra-territorial jurisdiction against parents, no court of chancery in England ever made an order requiring a father, however wealthy, to set apart out of his own estate a fund for the maintenance and education of his infant child, or even to provide sustenance for such child. The common law of England has, from the earliest times, left this duty to the natural feelings of the parents, and experience has shown that the confidence has not in general been misplaced. If distressing circumstances to the contrary sometimes arise, the most that can be said is that they illustrate a profound defect in the common law. The court cannot remedy this defect, for the courts have no legislative power. Arguments, addressed to us upon the reason and humanity of the rule which would sustain this action, are vain. They are addressed to a tribunal which has no jurisdiction to change the law of the land.

We have been referred to the case of Cowls v. Cowls, 8 Ill. 435, 44 Am. Dec. 708, in which the court sustained an action by a divorced wife against her husband for the maintenance of the

children of the marriage. Without reference to the ground on which the relief was put, it is sufficient to say that it is no authority for the present action. The action was brought by a wife, who had been divorced, against her late husband, and it may be assumed that the court still possessed jurisdiction over the subject of alimony and maintenance. But, whatever may be said of the ground on which that case proceeded, we are obliged to say that a single decision cannot change a rule of the common law which has been settled for ages.

The view which we take of this petition renders it unnecessary to consider whether, in view of the jurisdiction over the guardianship of minors, which our statutes have vested in the courts of probate, such a jurisdiction as is here invoked could be held to exist in the circuit courts in any event.

The judgment will be affirmed. All the judges concur.

Emancipation—Marriage.

WHITE v. HENRY.

24 Me. 531. 1845.

Assumpsit to recover the wages of a minor son of the plaintiff for the term of three months and twenty days, commencing on Oct. 28, 1843, as a seaman on board a vessel belonging to the defendants.

The services were performed, and the defendants proved payment therefor to the son, and contended that this was a discharge from the father.

The defendants at the time of making the contract, knew that the son was under age. The plaintiff did not know of the intention of the son to go to sea, nor of his having shipped until after he had sailed. The plaintiff had always supplied his son with the means of support so long as he would stay with him. The son was married in 1842, against his father's wishes, and without his consent, and contrary to his direction, having gone secretly into the State of Connecticut for that purpose, because his father would not permit him to marry here. The plaintiff has never expressly or impliedly given his assent to the marriage, but has always been ready and willing to support his

son in a manner becoming his degree and station in life. The son, however, has declined to live with his father, and has lived with his wife, having no children, when not at sea.

If the plaintiff was entitled to recover, the defendants were to be defaulted, and judgment was to be entered for the amount of the wages, at fourteen dollars per month; and if not, the plaintiff was to become nonsuit.

TENNY, J. It is a general principle well settled, that parents are under obligation to support their minor children, and that they are entitled to their earnings. When a contract between the parent and child exists, that the latter shall enjoy the fruit of his labors; or when the parent neglects to support him, the rule will not apply. If the father, or person having the care and control of the minor, should consent to his marriage, this may be another exception to the principle, so far as his earnings are necessary for the support of his wife and children; for the consent to the marriage may imply a consent that he should, from his earnings, have the means of discharging his new obligations.

The statute requires, that when a male, under the age of twenty-one years is to be married, the consent of the parent, guardian, or other person having the care or government of such party within the State, shall be obtained before marriage. Rev. St. c. 87, § 7. We cannot believe that the violation of an express provision of law, can secure to a minor, who is guilty thereof, a privilege, which he would not otherwise possess, and constitute another exception to the general law.

If the son is not entitled to his earnings, a payment to him of their value by his employer (without the consent of the father, express, or implied), knowing his minority, cannot deprive the father of the right to recover a just compensation for the labor, of which he has been deprived without his own fault or neglect.

The case at bar finds, that the son, whose wages are claimed in this action, refused to live with his father, who provided every thing necessary for his comfort and convenience. He went away without the knowledge, and married against the will and express direction, of his father. The father has in no way consented that he should have his earnings, but has always been ready and willing to support him in a manner becoming his degree and station in life. The defendants, knowing that he was a minor,

without the knowledge or consent of his father, employed him as a seaman, and have paid him his wages in full.

To allow this defence to prevail would hold out encouragement to sons, impatient of parental control, while in their minority, to resist the reasonable authority of their fathers, and give the latter little means to secure their own legal rights beyond the exercise of physical restraint; would offer inducements to youth to enter into improvident and ill-advised marriages, which maturer years would cause them to regret and deplore.

It is insisted that the defendants were authorized to suppose, that the son's marriage was by the father's consent. The father could not be deprived of that, which was his own, when no negligence was imputable to him, and the defendants by the knowledge of the son's minority, could have informed themselves of the facts before they made payment to him.

Defendants to be defaulted, and judgment to be entered at the rate of $14 a month for the time the son was employed, and interest from the date of the writ.

CHAPTER II.

SPECIAL RELATIONSHIPS—TORTS.

Parent's Liability to Third Persons for Child's Tort.

HOVERSON v. NOKER.

60 Wis. 511. 1884.

TAYLOR, J. It will be seen by examination of the record that it became important for the plaintiffs to connect the father with the acts of his young sons, which the plaintiffs allege caused the injury complained of, and for this purpose the plaintiffs offered evidence tending to prove that the sons had frequently, before the day upon which the accident happened, called abusive names, shouted, and frequently discharged fire-arms when persons were passing the house of the defendants, and that this was often done in the presence of their father. All evidence of this kind was excluded. This, we are inclined to hold, was error. If the father permitted his young sons to shout, use abusive language, and discharge fire-arms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which, in its nature, was likely to result in damage to those passing, and when an injury did happen from that cause he was not only morally but legally responsible for the damage done. If a parent permits his very young children to become a source of damage to those who pass the highway in front of his house, he is as much liable for the injury as though he permitted them to erect some frightful or dangerous object near the highway which would frighten passing teams; and in such case he cannot screen himself by saying that he did not in words order the erection to be made. If he made it himself, with the intention to frighten passing teams, he would be responsible for the injury caused by it; and when he permits his irresponsible children to do it he is equally liable, because he has the control of his premises as well as of the

children, and is bound to restrain them from causing a dangerous thing to be erected on his premises near the highway; and permitting his young sons to become an object of fright to teams passing, is certainly equally, if not more reprehensible than permitting an inanimate structure to be placed where it would cause such fright. We think the evidence ought to have been admitted in order to connect the father with the acts of the young sons which caused the injury when the plaintiffs were on their way to church in the morning, as well as when on their return from the church in the afternoon.

PART II

THE INFANT

CHAPTER III.

THE LAW RELATING TO THE PERIOD OF INFANCY AND TO MAJORITY.

When an Infant Attains Majority.

STATE v. CLARK.

3 Harr. 557 (Del.). 1840.

The defendant was presented by the grand jury for illegal voting at the late inspector's election.

The presentment set forth these facts, to wit:—That the defendant was born on the 7th of October, A. D. 1819, and voted at the election held on the 6th of October, 1840, upon age. In his behalf a motion was now made to quash the presentment on the ground that it appeared from the face of it that the defendant was of full age at the time he voted, and was, therefore, not guilty.

BAYARD, C. J. Many persons suppose that the expression in the Constitution relative to the qualifications of voters is, that citizens between the ages of twenty-one and twenty-two years shall be entitled to vote without paying tax; and on this the common, but erroneous notion is, that a man must be in point of fact actually within his twenty-second year before he can vote. The premises and conclusion are both wrong. "Every free white male citizen of the age of twenty-one years, and under the age of twenty-two years, having resided as aforesaid, shall be entitled to vote without payment of any tax." (Const., art. 4, § 1.) To ascertain when a man is legally "of the age of twenty-one years," we must have reference to the common law, and

those legal decisions which from time immemorial have settled this matter, in reference to all the important affairs of life.

When can a person make a valid will; when can he execute a deed for land; when make any contract or do any act which a man may do, and an infant, that is, a person under the age of twenty-one years, cannot do? On this question the law is well settled; it admits of no doubt. A person is "of the age of twenty-one years" the day before the twenty-first anniversary of his birthday.

It is not necessary that he shall have entered upon his birthday, or he would be more than twenty-one years old. He is, therefore, of age the day before the anniversary of his birth; and, as the law takes no notice of fractions of a day, he is necessarily of age the whole of the day before his twenty-first birthday; and upon any and every moment of that day may do any act which any man may lawfully do. 1 Chit. Gen. Prac. 766. "It is to be observed that a person becomes of age on the first instant of the last day of the twenty-first year *next before* the anniversay of his birth; thus, if a person were born at any hour on the first of January, A. D. 1801 (even a few minutes before twelve o'clock on the night of that day), he would be of full age at the first instant of the 31st of December, A. D. 1821, although nearly forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours, and minutes; because there is not in law in this respect any fraction of a day; and it is the same whether a thing is done upon one moment of the day or another."

On the face, then, of this presentment, it appears that Mr. Clark was entitled to vote on the 6th of October, being on that day of the age of twenty-one years; and the presentment, showing no offence, must be quashed.

CHAPTER IV.

INFANT'S CONTRACTS AND CONVEYANCES.

Division I.—Where the Adult Takes the Initiative.

Ratification—What Constitutes Ratification.

BOYDEN v. BOYDEN.

9 Met. 519 (Mass.). 1845.

Assumpsit for goods sold and delivered, and on the money counts. Writ dated March 2d, 1843. At the trial in the court of common pleas, before Williams, C. J., the plaintiff gave in evidence a promissory note for $44, given to him by the defendants on the 12th of April, 1838. The defense was infancy; and the defendants introduced evidence tending to prove that one of them was born February 9th, 1818, and the other August 11th, 1819. There was also evidence tending to prove that the said note was given for a horse and plough, bought of the plaintiff by the defendants; and that they kept the said horse and used him, about a year after buying him, and then exchanged him for another horse. There was no evidence that the defendants had disposed of the said plough, or that they, or either of them, ever offered to restore the said horse or plough to the plaintiff, or ever, in any way, gave notice of their intention to rescind and avoid their said contract.

The judge instructed the jury, that if the defendants retained the property, for which the note was given, in their own hands, and used it for their own purposes, for an unreasonable time, after arriving at the age of twenty-one years, without restoring it to the plaintiff, or giving him notice of their intention to avoid the contract, it operated as a ratification of said contract, and rendered the defendants liable in this action. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions to said instructions.

SHAW, C. J. The questions as to what contracts of an infant are void, and what voidable, and, in the later case, what shall be deemed a disaffirmance, and what a ratification, are questions which have been much discussed, and in respect to which there are conflicting authorities. It is not my intention now to review them. Some points seem to be well settled.

If a minor gives a written promise for the purchase money for goods sold to him by an adult person, the contract is voidable and not void, and may be ratified by the infant, after coming of age. Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229. It is also well settled, that it is the privilege of the minor only to disaffirm the contract, and, until he does so, the other party is bound by it. The minor, when of age, may regard it as beneficial, and choose to affirm it. But if he elects to disaffirm it, he annuls it on both sides, *ab initio,* and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revest in the vendor. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105. But until some notice given by the purchaser, after coming of age, of his purpose to annul the contract, or some significant act done, the vendor cannot reclaim his property, and his taking of it would be a trespass. If, therefore, the minor purchaser, after coming of age, retains the specific property, treating it as his own, when it is in a condition to be restored, and it is of any value, and if, for an unreasonable time, he neglects to restore it, or to tender it, or give notice of his readiness to restore it, according to the circumstances of the property and of the parties, it manifests his determination to keep the property and affirm the contract. And further; if, after coming of age, he retains the property for his own use, or sells or otherwise disposes of it, such detention, use or disposition—which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by if the property became his own—is evidence of an intention to affirm the contract, from which a ratification may be inferred. In the present case, the defendants retained the plough, one of the articles for which the note was given, between two and three years after they both came of age. Whether, if the contract had been rightfully disaffirmed, the vendor could have reclaimed the horse received by the defendants, in exchange for the one sold,

after one of the defendants came of age, but not the other, we give no opinion. Retaining the plough brings the case within the principle. The court are of the opinion that the directions of the judge at the trial were right, and well adapted to the case presented by the evidence. See Boody v. McKenney, 23 Me. 517.

Exceptions overruled.

Necessaries.

McCRILLIS v. HOW.

(Superior Court of Judicature of New Hampshire, 1826.)

3 N. H. 348.

Assumpsit upon a note, dated February 21, 1823, for $21.92, made by the defendant and payable to the plaintiff or order. There was also a count upon an account for medicines and visits, as a physician, amounting to $21.92.

The cause was submitted to the decision of the court, upon the following facts. The plaintiff did the services and furnished the medicines, mentioned in the second count; but at the time, the defendant was an infant under the age of twenty-one years. The services so rendered, and the medicines so delivered, were necessary and proper for the defendant. On the 21st February, 1823, the defendant gave to the plaintiff the note, mentioned in the first count, to balance said account; and the plaintiff did balance the account upon his book by giving credit for the said note. At the time the said note was given, the defendant was an infant, under the age of twenty-one years.

BY THE COURT. It has long been settled, that no action can be maintained against an infant, upon a promissory note. The reason assigned is, because, if the note was held to be valid, the infant would, when the note was in the hands of a bona fide endorsee, be precluded from disputing the original debt. Chitt. on Bills, 24; 1 D. & E. 40, Freeman v. Hurst; 3 Caines 323 (N. Y.), Van Winkle v. Mitcham; 10 Johns. 33 (N. Y.), Swazey v. Adm'r of Vanderheyden; 2 Starkie 36, Ingledew v. Douglas; Campbell 552, Williamson v. Watts; Carthew 160, Williams v. Harrison et al.

The plaintiff, then, cannot recover upon his first count. But

we see no objection to a judgment in his favor, on the second count. A void note, given to balance an account, is no satisfaction. 2 Johns. (N. Y.) 455, 3 Am. Dec. 446, Markle v. Hatfield; 1 Esp. N. P. R. 5; 6 D. & E. 52, Puckford v. Maxwell; 3 Brod. & Bing. 295; 7 Taunton 312, Hickling v. Hardy; 4 East 147.

Judgment for the plaintiff.

Division II.—Where the Infant Takes the Initiative.

Where the Infant Disaffirms and Then Seeks to Recover Consideration He Paid Adult—Right to Recover—Where Infant Received Consideration—Before Majority.

STAFFORD v. ROOF.

9 Cow. 626 (N. Y.). 1827.

Trover for a horse. On the trial it appeared that the plaintiff while an infant sold the horse to the defendant. The defendant paid the price and the plaintiff was still an infant.

The defendant moved for a nonsuit on the ground, among others, that it was not competent for the plaintiff below to avoid his contract while yet under age. The motion was overruled. The court charged that the plaintiff below had a right to bring his action while yet an infant. To this ruling and charge the defendant excepted. Verdict and judgment for the plaintiff. The defendant brought error to the Supreme Court, which reversed the judgment on the sole ground that an infant cannot avoid his executed contract during his minority. Error was brought to the Court for the Correction of Errors.

JONES, CHANCELLOR, said: It is true in general that the deed of an infant is voidable merely, when delivered with his own hand, and is of equal validity, whether it be of lands or chattels. Some of the old writers seem to make a distinction between deeds and other contracts of infants accompanied by manual delivery; but the distinction is now discarded, and the same effect is given to both. They are not void, but voidable, where any act of delivery is done by the infant calculated to carry an estate; and this whether the contract be beneficial to

the infant or not. But a manual delivery seems in such case to be essential. None was shown in this case. The fact of possession by the vendee would be evidence of delivery in the case of an adult; but in case of an infant vendor, there should be strict proof of a personal delivery. An infant cannot make an attorney. The appointment would be void; and there being no proof of actual manual delivery, the contract would seem to be void. The agreement to sell conferred no right upon the vendee to take. The mere agreement of the infant to sell would not protect the vendee against an action of trespass for taking the horse. The taking would be tortious; and in itself a conversion.

But suppose the sale to be merely voidable; could the infant or his guardian avoid it before he arrived at 21 years of age? The general rule is, that an infant cannot avoid his contract executed by himself, and which is therefore voidable only, while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant; or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive; and such was the doctrine of Zouch v. Parsons, 3 Burr. 1794. Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases; and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be this: that where the infant can enter, and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there is no legal means to regain and hold it in the meantime, the infant, or his guardian for him, has the right to exercise the power of rescission immediately. Now the common law gives no action or other means by which the mere possession of personal property can be reclaimed, and held subject to the right of avoidance.

Beside, in this case the infant had a general guardian. It may well be doubted whether he could make any contract of

sale which should bind him, for any purpose, during his wardship.

(Other opinions omitted.)

By a majority vote the judgment of the Supreme Court was reversed.

EDGERTON v. WOLF.

6 Gray 453 (Mass.). 1856.

Tort for the conversion of a horse. At the trial it appeared that the defendant Wolf was a minor, and after purchasing the horse from the plaintiff had returned it to the plaintiff, and had thereafter taken the horse from the plaintiff and sold it. The other defendant, Crafts, subsequently had possession of the horse. The sale by the infant and the possession of Crafts, were the acts of conversion complained of.

The defendants contended that if the sale from the plaintiff to Wolf was absolute it vested the property in Wolf, and a re-sale or return of it by him to the plaintiff, even if voluntarily made, was a voidable act and was avoided by Wolf's re-taking the property and selling it. But the court refused so to rule and instructed the jury "that, if Wolf had the property of the plaintiff, and afterwards voluntarily returned it to him, intending to give up all his interests in it to him, and the plaintiff accepted and took possession of the property, such surrender would restore the title to the plaintiff, and the plaintiff could not afterwards lawfully retake the property and sell it." The defendant excepted to the charge and the jury returned a verdict for the plaintiff.

DEWEY, J. (after deciding other questions, continued:) The remaining exception is to the ruling of the court that, if Wolf received the property of the plaintiff under a contract of sale, but afterwards voluntarily returned it to the plaintiff, intending to give up all his interest in it, and the plaintiff accepted it, such surrender would restore the title to the plaintiff, and Wolf could not afterwards lawfully retake the property and sell it. Looking at the precise state of facts as developed in this case, we have no doubt of the correctness of the ruling. Wolf, a minor, had, as he alleged, bought the horse of

the plaintiff, but the contract was that of a minor, and so voidable at his election. This he might do as well against as with the consent of the plaintiff. The case finds that he did thus voluntarily return the horse to the plaintiff, intending to give up all his interest in the property. The case is none the worse for the plaintiff, because he assented to this act of avoidance and return of the property by Wolf. The sale, which was voidable, was thus avoided by the infant, and all the rights of the vendor revested in him. Wolf had thus effectually availed himself of any privilege which attached to his minority, and the contract was no longer in force. With the surrender of the property to the plaintiff, intending to give up all his interest in it, he ceased to have any right over the property, and could not retake the same against the will of the plaintiff.

Exceptions overruled as to Wolf.

Disaffirmance—After Majority—Where He Still Has the Consideration.

WALLACE v. LEROY.

57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777. 1905.

POFFENBARGER, J. This case is governed by legal principles applicable to contracts made by persons affected by the disability of infancy. Charles Leroy, an orphan boy, dependent upon his own resources for a living, owned and managed a cigar stand in the Florentine Hotel, at Huntington, W. Va., prior to May 29, 1902, and became indebted to a number of persons and firms for cigars, board, rent, and other things. Having become embarrassed, he gave his creditors worthless checks, moved part of his stock into the basement of an adjoining building, prepared to leave the city, and, on the day above named, sold all his stock of goods to A. A. Hanly, and departed. Geo. S. Wallace, an attorney to whom several claims against Leroy, amounting to nearly $300, had been delivered for collection, took assignments of them, and, on the day of the sale to Hanly, instituted an action against Leroy before a justice of the peace, in which an attachment was sued out, and copies thereof served on Hanly and other persons who were supposed to be indebted to the

defendant, or to have property in their hands belonging to him. Hanly answered, admitting indebtedness on account of the purchase money of the property, amounting to $371.73. The defendant appeared by guardian ad litem, and set up his infancy, among other defenses. A jury was waived and the justice rendered a judgment in favor of the plaintiff for $269.72, and ordered the garnishee to pay the same, together with the costs, out of the money so due from him. In a trial de novo by a jury in the circuit court on appeal, a demurrer to the evidence was sustained by the court, and a judgment of nihil capiat entered.

* * * * * * * * * *

The effect of the establishment of the fact of infancy depends upon the forum in which it is set up, the right in controversy, the time at which the benefit of it is claimed, and other conditions. Since the rules, principles, and processes of courts of equity are in many respects essentially different from those applied in courts of law, a party asserting rights to which he is entitled by reason of the disability of infancy may, in equity, be compelled to submit to conditions unknown to the common-law courts. As a condition of obtaining relief, he may be required to do equity, or to come into court with clean hands. For principles governing the procedure in equity in such cases, some of which are not applicable here—this being an action at law—see Mustard v. Wohlford's Heirs, 15 Grat. 329, 76 Am. Dec. 209; Bedinger v. Wharton, 27 Grat. 857; Gillispie v. Bailey, 12 W. Va. 92, 29 Am. Rep. 445.

Nor is this a possessory action by the infant to recover back specific property sold or bartered away by him. In such case he seeks to undo an executed contract, and to set up title to property, and many cases hold that he must return the money, or the property he received in exchange for it, if he is able to do so. 1 Min. Ins. 525; Taft v. Pike, 14 Vt. 405, 39 Am. Dec. 228; Weed v. Beebe, 21 Vt. 495; Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Boody v. McKenney, 23 Me. 517; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 737. What acts of disaffirmance would be sufficient to revest the title in him need not be indicated here.

Many of the reported cases present instances of disaffirmance by infants after having attained their majorities, in which it is

necessary to determine whether there has been a ratification. Aside from the question of ratification, this is important where the contract was one of sale of the infant's land, for it is said he cannot disaffirm such sale before he reaches maturity, since it requires as much discretion and judgment to rescind as to make a contract. 1 Min. Ins. 523. But he may have possession of the land against his contract while under age.

This is a mere personal contract whereby the infant has obligated himself to pay money, and which he repudiates while under age. Though executed on the part of the plaintiff's assignors, it is executory on his part. He is not seeking to recover either property or money, but simply defending against a demand for money. To avail himself of this defense, he need not return or offer to return what he has received. Weed v. Beebe, 21 Vt. 495; Fitts v. Hall, 9 N. H. 441; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146; Aldrich v. Grimes, 10 N. H. 194; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105. However, the legal effect of the plea, sustained by proof, is to annul the contract, and revest in the assignors or plaintiff, as against the defendant, the title to the property they sold him. If he has any of it, they may recover it from him by any proper possessory remedy. 1 Min. Inst. 524; 16 Am. & Eng. Ency. Law, 294; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Nolan v. Jones, 53 Iowa, 387, 5 N. W. 572; Strain v. Wright, 7 Ga. 568; Brantley v. Wolf, 60 Miss. 420; Evans v. Morgan, 69 Miss. 328, 12 South. 270. This confers upon the party who made the sale to the infant a right to reclaim his property, which is essentially different from the right to recover damages for breach of a contract. There must be restoration, but not by tender or return of the property at or before pleading infancy against the money demand. It follows as a legal consequence, to be enforced by a separate, subsequent, appropriate proceeding.

The foregoing propositions are subject, however, to the qualification that infancy is no defense to an action for the purchase money of articles furnished to an infant which are necessary to his subsistence and comfort, and to enable him to live according to his real position in society. * * *

The application of these principles makes it impossible to sustain the view taken by counsel for the plaintiff in error as

to any part of the demand, except the one for board. He is unable to establish a debt against the defendant. This is admitted. What its effect upon the title to the property in the hands of the purchaser from the defendant may be is a question not now presented for adjudication. This action is not to recover that property or its proceeds in the hands of the purchaser as the property of the plaintiff, but to obtain a personal judgment against the defendant, to the discharge and satisfaction of which the purchase money is sought to be appropriated by means of the garnishment, which is in the nature of an execution for the enforcement of satisfaction of a judgment out of the defendant's property. By his disaffirmance of the contract, the basis for a judgment against him has failed. What remains is a mere right to follow up property, which can no more constitute ground for a personal judgment than did the contract itself, after the defense of infancy has been made out. By allowing a personal judgment on that ground, the court would virtually make and enforce a new contract of sale between the parties. Escape from this logical result is attempted by saying the case is analogous to a proceeding against a nonresident, in which, although no personal judgment can be taken except upon appearance, the defendant's property may nevertheless be subjected to sale for satisfaction of the debt. But the cases cannot be assimilated. In an attachment against a nonresident proceeded against by order of publication, and not appearing, it must be shown, prima facie, that there is a debt due from the defendant to the plaintiff, and that the attached property belongs to the former. Both of these conditions are wanting in the case now under consideration.

Moreover, it was the right of action arising out of the contract, and no other, that the plaintiff acquired by the assignment. If the property obtained by the defendant under the contract still remained in his hands, it would be the subject of an independent action for its recovery; and, if any part of the proceeds of that property remaining in the hands of the garnishee can be recovered, it also gives rise to a cause of action distinct from, and independent of, that arising from the contract, to which the plaintiff had not shown himself entitled by any assignment. It is a right to follow up and reclaim the plaintiff's own property, not a right of action for damages

consequent upon a breach of contract. What then in this case, except the claim for board, can afford a shadow of basis for recovery? Absolutely nothing. As there can be no judgment against the defendant, the attachment must wholly fail. There is nothing to be satisfied. There being no debt, there can be no attachment to seize and hold the property of the defendant to satisfy a debt.

Counsel for plaintiff in error rely upon Evans v. Morgan, 69 Miss 328, 12 South. 270, to sustain their contention, but upon examination it is found to be exactly contrary thereto. An infant engaged in merchandising, became indebted, and then made a fraudulent sale of his stock of goods to his father. In an action at law he set up, and defeated his creditors by, his plea of infancy. They then brought a suit in equity to set aside the sale and subject the property to the payment of their debt. Although unable to identify their property, the court held that they were entitled to have satisfaction out of the proceeds of the property, because the proof showed that it had been so mingled by the defendant with other property as to destroy its identity. While the creditors in that case were thus permitted to resort to the property for their satisfaction, their remedy was entirely different, not only as to the forum, but also in its nature. It proceeded upon the theory that the contract had been abrogated, and the creditors were following up and recovering their property, and not merely seeking to enforce the contract.

(The judgment of the lower court was reversed as to the item of $13.24, the claim for board.)

When the Right to Disaffirm After Majority Must Be Exercised.

PROUT v. WILEY.

28 Mich. 164. 1873.

CHRISTIANCY, C. J. This was a bill to remove a cloud from the complainant's title to one hundred and sixty acres of land in Ingham county. The title, and the facts affecting it, as shown by the evidence, were as follows: Cornelius Cadwell,

being then a minor, purchased the land at the United States Land Office, December 23, 1848, and on the 5th day of October, 1850, while still a minor (and only twenty years old in July of that year), sold and conveyed the land to George A. Wallace, for the consideration of one hundred and twenty-five dollars. * * * Shortly after the execution of the deed, in the spring of 1851, and while yet a minor, Cadwell left the state and went to California, and thence to Central America, and did not return to this state until the latter part of August, 1857. In the meantime, Wallace, on the 28th day of October, 1850, conveyed the land to one Phoebe Ann Skidmore, who, on the 14th of September, 1853, conveyed the same to one Charles Koegel, who was in possession of the land when Cadwell returned from Central America in 1857. In November, 1857, Cadwell, then living in Washtenaw county, some eighteen or twenty miles from the land, went and saw Koegel, informed him that at the time he made the deed to Wallace he was a minor, and that the deed was not good; but offered to give him a deed for seventy-five dollars in money. Koegel offered to pay him that amount in stock, which Cadwell refused, and Koegel said he would have the money the next May. Cadwell again called upon Koegel the next May for the money; but Koegel then refused to do any thing about it, claiming that his title was good, whereupon Cadwell, as he testifies, caused a notice of ejectment to be served upon Koegel. Nothing further, however, appears then to have been done. In the winter of 1859 or 1860 Cadwell went and resided at Leroy in Ingham county, within two miles of the land, where he seems to have resided till the latter part of 1864 or the spring of 1865, when he removed to Williamston, in Ingham county, whence, in the spring of 1865, he was drafted into the army, and returned in September, 1865.

Sometime between 1857 and 1865 (the exact date does not appear), Koegel died, leaving, as we infer from the evidence, a tenant in possession, who had gone in previous to his death. While Cadwell was in the army he was informed that this tenant had left the land and the premises were vacant, and he thereupon authorized one Lewis Haviland, the son of Lewis J. Haviland, next mentioned, to take possession of the land for him; which he did, and continued in possession until June 1st, 1865, when Cadwell sold and conveyed the premises by war-

ranty deed to Lewis J. Haviland, who took possession under his deed and remained in possession until December 17th, 1867, when he sold and conveyed the premises to complainant, who took and holds possession under his deed.

On the third day of November, 1865, some five months after Cadwell had conveyed to Haviland, and while the latter was in possession, the administrator on the estate of Koegel, in pursuance of a license from the probate court, sold the land, or the interest of the deceased therein, to the defendant Wiley, and the report of the sale by the administrator to the probate court (which was confirmed), states, among other things, that there was an adverse claim to the premises sold to said Wiley, and that another party claims to hold the same.

The amount of the improvement upon the land was small, being only about or a trifle over twenty acres, some of which was imperfectly cleared, and the buildings poor and of little value. Whatever of improvement there was upon the land seems to have been mostly made by Koegel, while Cadwell was absent in California and Central America, and if any were made after his return, they were made, so far as the case shows, after Koegel had received notice from Cadwell that he repudiated the deed, or did not intend to be bound by it. And there is no evidence in the case tending to show that Cadwell stood by, after his majority, when improvements were being made upon the land, without objections or notice, or that he was ever aware of any improvements going on upon the land. In our view, therefore, the case is disembarrassed of any question of estoppel upon this ground; and the only question in reference to the validity or effect of the minor's deed, is whether his neglect to make an actual disaffirmance of the deed, by entry or conveyance, until the time he undertook thus to disaffirm it, did, under the circumstances of this case, operate as an affirmance or confirmation of the deed executed during his minority; for, though the question has sometimes been raised whether the conveyance to another person after becoming of age, would, without entry, operate as a disaffirmance, there was here both an actual entry and a conveyance, which clearly operated as a disaffirmance, unless the delay which had previously occurred amounted to an affirmance, and cut off the right to disaffirm.

Upon this question of the affirmance of a deed executed dur-

ing minority, by mere lapse of time, or in other words, by mere silence or acquiescence for any particular period of time, after the minor has attained his majority, it is sufficient, without citing and analyzing authorities, to say that, by the great weight of authority, both English and American, such delay or acquiesence, without any affirmative act indicating an intention to affirm, or tending to mislead the grantee into a belief of such intention, or any circumstances of equitable estoppel, such as standing by and seeing improvements made or money expended, or a sale of the property to another, without asserting his claim (or some such special circumstance), will not operate as an affirmance or confirmation of the deed executed during minority, nor prevent the minor from disaffirming it and reclaiming the land at any time allowed him by the statute of limitation for bringing an action. The question, in such a case, is substantially but a question of the time within which an action may be brought; and the legislature having fixed the time which to them seemed reasonable for this purpose, it is not within the power of the judiciary to change it. But when facts exist which create an equitable estoppel, as above intimated, or some other special circumstances such as are above alluded to, so that the question ceases to be one merely of the length or lapse of time, it may perhaps be very proper to hold, as many cases have held, that the infant should manifest his purpose to disaffirm within a reasonable time; and what should be held to be a reasonable time, might depend much upon the special circumstances of the particular case.

This distinction reconciles nearly, though not quite all of the decisions upon this subject.

In the present case, we can discover no grounds of equitable estoppel and no such special circumstances as can properly be held to change the question from that of simple delay or lapse of time in disaffirming the deed; and we must therefore hold that Cadwell had the right to disaffirm, to re-enter upon the land and to convey to Haviland; and that the complainant therefore obtained and holds the title, and is entitled to the relief he asks to remove the cloud created by the administrator's deed to the defendant.

But the complainant stands only in the place and succeeds only to the rights of Cadwell, who, while a minor, had conveyed

to Wallace; and the defendant occupies the place and is entitled to the equities to which Wallace would have been entitled, had he not conveyed and Cadwell had sought to disaffirm the deed and convey the property. Neither complainant nor defendant has obtained any other rights or equities to which Wallace would have been entitled, had he not conveyed and Cadwell had sought to disaffirm the deed and convey the property. Neither complainant nor defendant has obtained any other rights or equities than would have existed between Cadwell and Wallace. And as the privilege of infancy is a shield for the protection of the infant, and not a weapon of attack, nor to be used as an engine for defrauding others, and he cannot, therefore, especially in a court of equity, be allowed to disaffirm and repudiate his deed and regain the property, without restoring the consideration he had received for it (there being no evidence of bad faith in Wallace in making the purchase). And as the complainant, standing in his place and clothed only with his rights, is compelled to ask the aid of the court of equity to remove the cloud upon his title, he should, I think, as a condition of that relief, consent to do equity to the other party. Hillyer v. Bennett, 3 Edw. Ch. 222; Locke v. Smith, 41 N. H. 346; Strain v. Wright, 7 Geo. 568; Bailey v. Barnberger, 11 B. Mon. (Ky.) 113; Weed v. Beebe, 21 Vt. 495; 2 Kent's Com. 240.

But upon this point my brethren do not concur in laying down the principle thus broadly, though my Brothers Cooley and Graves concur in the result upon this point in the present case, on the ground that complainant makes no objection to the allowance to defendant of the amount of the consideration, and by implication admits its justice in the present case, while my Brother Campbell thinks the principle inapplicable, even upon this ground, without the clear and express assent of complainant, in a bill like this, to quiet title.

* * * * * * * * * *

A decree of this court should therefore be entered affirming the decree of the court below in favor of the complainant, on condition that complainant, within sixty days from this date, pay to the defendant the said sum of one hundred and twenty-five dollars, and with interest to the day of such payment; otherwise that complainant's bill be dismissed, with costs to defendant.

The other Justices concurred.

Disaffirmance—Where Infant Has Parted With the Consideration—As to Property Other Than Real Estate—American Rule.

JOHNSON v. NORTHWESTERN MUT. LIFE INS. CO.

56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473. 1894.

On October 25, 1888, the defendant insured the life of the plaintiff, Martin C. Johnson, then of Stoughton, Wis., in the sum of $1,000. By its policy it agreed to pay him that sum twenty years thereafter, or in case of his death meantime to pay it to his representatives or assigns sixty days after due proof of his decease. After ten years he was to share in the surplus profits of the company arising from the policy. After three or more annual premiums were paid he was entitled to a paid-up nonparticipating policy for as many twentieth parts of the $1,000 as he had paid annual premiums. He paid $23.29 on that date and agreed to pay a like sum every six months thereafter. He was then but seventeen years of age. He paid seven of these semiannual installments, in all $186.32. On December 19, 1892, immediately after he became of age, he served written notice on the Insurance Company that he elected to avoid the policy and offered to return it, and demanded a return of the money he had paid. It was not repaid, and he soon after brought this action to recover it. His complaint stated these facts, and a copy of the policy was attached. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appeals.

BUCK, J., delivered the opinion of the Court in favor of the respondent, and the order appealed from was affirmed. On re-argument the following opinions were filed:

MITCHELL, J. * * * The former opinion laid down the following propositions, to which we still adhere: (1) That the contract of insurance was of benefit to the infant himself, and was not a contract for the benefit of third parties. (2) The contract, so far as appears on its face, was the usual and

ordinary one for life insurance, on the customary terms, and was a fair and reasonable one, and free from any fraud, unfairness, or undue influence on part of the defendant, unless the contrary is to be presumed from the fact that it was made with the infant.

It is not correct, however, to say that the plaintiff has received no benefit from the contract, or that the defendant has parted with nothing of value under it. True, the plaintiff has received no money, and was insured for four years, and if he had died during that time the defendant would have had to pay the amount of the policy to his estate. The defendant carried the risk all that time, and this is the essence of the contract of insurance. Neither does it follow that the risk has cost the defendant nothing in money because plaintiff himself was not one of those insured who died. The case is therefore one of a voidable or rescindable contract of an infant, partly performed on both sides, the benefits of which the infant has enjoyed, but which he cannot return, and where there is no charge of fraud, unfairness, or undue influence on the part of the other party, unless, as already suggested, it is to be presumed from the fact that the contract was made with an infant. The question is, can the plaintiff recover back what he has paid, assuming that the contract was in all respects fair and reasonable? The opinion heretofore filed held that he can. Without taking time to cite or discuss any of our former decisions, it is sufficient to say that none of them commit this court to such a doctrine. That such a rule goes further than is necessary for the protection of the infant, and would often work gross injustice to those dealing with him, is, to our minds, clear. Suppose a minor engaged in agriculture should hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business, with a capital of $5,000, should, from time to time, buy and pay for $10,000 worth of goods, in the aggregate, which he had sold, and had got his pay. According to this doctrine, he could recover back the $10,000 which he had paid to the various parties from whom he had bought the goods. Not only would such a rule work great injustice to others, but it would be positively injurious to

the infant himself. The policy of the law is to shield or protect the infant, and not to debar him from the privilege of contracting.

But, if the rule suggested is to obtain, there is no footing on which an adult can deal with him, except for necessaries. Nobody could or would do any business with him. He could not get his life insured. He could not insure his property against fire. He could not hire servants to till his farm. He could not improve or keep up his land or buildings. In short, however advantageous other contracts might be to him, or however much capital he might have, he could do absolutely nothing, except to buy necessaries, because nobody would dare to contract with him for anything else. It cannot be that this is the law. Certainly, it ought not to be.

The following propositions are well settled everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessaries:

First. That, in so far as a contract is executory on part of an infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield.

Second. If the contract has been wholly or partly performed on his part, but is wholly executory on the part of the other party, the minor having received no benefits from it, he may recover back what he has paid or parted with.

Third. Where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received.

Fourth. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in *statu quo*, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider.

Fifth. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what

he has paid, must always restore what he has received, in so far as he still retains it in specie.

Sixth. The courts will always grant an infant relief whether the other party has been guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot. This was held in the leading case of Holmes v. Blogg, 8 Taunt. 508, approved as late as 1890 in Valentini v. Canali, 24 Q. B. Div. 166. Some obiter remarks of the chief justice in Holmes v. Blogg, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved,—a fact which has sometimes led to the erroneous impression that the case itself has been overruled. Corpe v. Overton, 10 Bing. 252 (decided by the same court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant had never enjoyed its benefits.

In Chitty on Contracts (volume 1, p. 222), the law is stated in accordance with the decision in Holmes v. Blogg. Leake,—a most accurate writer,—in his work on Contracts (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent, Comm. 240), and Reeves in his work on Domestic Relations (chapters 2 and 3, tit. "Parent and Child"), state the law in exact accordance with what we may term the "English rule." Parsons, in his work on Contracts (volume 1, p. 322), undoubtedly states the law too broadly, in omitting the qualification, "and enjoys the benefit of it."

At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." See, among others, Riley v. Mallory, 33 Conn. 206; Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; Breed v. Judd, 1 Gray (Mass.) 455. But many—perhaps a

majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule.

The dissatisfaction with what we have termed the "English rule" seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet if he was an adult the court would grant him no relief, but leave him to stand the consequences of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that would be applied in the case of an adult would be to fail to give due weight to the disparity between the adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendency over the other, or tends to prevent the latter from exercising an intelligent and unbiased

judgment, is always a most vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties.

If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessaries. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence, or overreaching.

A similar principle applies to all the relations, where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendency which prevents the other from exercising an unbiased judgment,—as, for example, parent and child, husband and wife, guardian and ward. It is true that the mere fact that a person is dealing with an infant creates no "fiduciary relation" between them, in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing, and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this as in all other cases, the degree of disparity between the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant should recover would depend on the nature and extent of the element of unfairness which characterized the transaction.

If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid, without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially

improvident, calculated to facilitate the squandering the infant's estate, and which the other party knew or ought to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as Medbury v. Watrous, 7 Hill (N. Y.) 110; Sparman v. Keim, 83 N. Y. 245; and Heath v. Stevens, 48 N. H. 251,—really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice.

Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract the plaintiff

could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy.

But it appears from the face of the policy that these premiums covered something more than this. The policy provides that after payment of three or more annual premiums the insured will be entitled to a paid-up, nonparticipating policy for as many twentieths of the original sum insured ($1,000) as there have been annual premiums so paid. The complaint alleges the payment of four annual premiums. Hence, the plaintiff was entitled, upon surrender of the original policy, to a paid-up, nonparticipating policy for $200; and it therefore seems to us that, having elected to rescind, he was entitled to recover back, in any event, the present cash "surrender" value of such a policy. For this reason, as well as that the burden was on the defendant to prove the fair and honest character of the contract, the demurrer to the complaint was properly overruled. The result arrived at in the former opinion was therefore correct, and is adhered to, although on somewhat different grounds. Order affirmed.

GILFILLAN, C. J. I dissent, and especially from the proposition that in any case the contract of a minor is presumed to be fraudulent on the part of the other party to it. If two minors contract together, each may avoid the contract. Is that because each is presumed to have fraudulently drawn the other into making it? If a contract be wholly executory when the minor seeks to avoid it, will any amount of proof that it is advantageous to him, and made in good faith and honest on the part of the adult, prevent the minor avoiding it? If wholly executory when made, will the subsequent performance raise a presumption that it was fraudulent when made?

A minor's contract, except for necessaries, is voidable by him only because he is, in law, incapable to bind himself. When he seeks to avoid a contract the question arises, on what conditions shall he do so? In such cases there are two considerations—First, to afford him full protection from the consequences of his own incapacity; second, that being done, to prevent him making his legal incapacity a means to defraud others.

If the contract be wholly executory, both ends will be attained

by allowing him to repudiate it, which will leave both parties as they were before it was made. But suppose it is partly performed on both sides? He may undoubtedly avoid further performance. But if he takes the aggressive, and seeks to recover what he has parted with in performance, what then? The authorities are agreed that, if he have in specie what he received under it, he must restore it, as a condition of recovering what he parted with. The disagreement in the authorities is in cases where he cannot restore the benefits he has received; where he has expended them, or they are of such a character that they cannot be restored. I am speaking only of contracts relating to the personalty.

Since the first argument of this cause, I have come to the conclusion that whether, when he cannot restore what he has received, he may recover what he has parted with, will depend on the character of the contract. If from the subject-matter or terms of the contract, it is a wasting of his estate, so that to require him to restore what he has received will likewise waste his estate, it will not be required of him. But if the contract be, both in subject-matter and terms, a provident one,—advantageous to the minor,—the court, to prevent a fraud on the other party, unnecessary to his protection, will not permit him to recover what he has parted with without setting off against it what he has received. Such is this case.

EUREKA CO. v. EDWARDS.

71 Ala. 248, 46 Am. Rep. 314. 1881.

Bill in equity by Eureka Company to set aside a deed of June 12th, 1869, executed by Joseph C. Burgin and Ann Judson, both minors, to Giles Edwards. The facts alleged and proved were that the consideration paid for the conveyance was $1,100, of which Joseph C. and Ann Judson received $200, and each had used and expended this money before they reached twenty-one. Upon attaining their majority the said Joseph C. and Ann disaffirmed their deed to Edwards and conveyed to others, from whom the title came to the complainant, the Eureka Company.

On the hearing had on pleadings and proof the Chancellor

entered a decree denying relief to the complainant and granting an injunction prayed by Giles Edwards in his cross bill, that the complainant be perpetually enjoined from setting up any claim to the premises in question. This decree is assigned as error.

STONE, J. (The Court, after summing up the facts, proceeded thus:) It is thus shown that the appellant—complainant below—stands in the shoes, and can assert only the rights which Joseph C. Burgin and Ann Judson Thrasher could originally assert. Appellee contends that if the complainant has made a good case on all the points noted above, the contract of sale to Edwards and associates can be disaffirmed and set aside, only on condition that the money paid by them for the mineral rights is either paid or tendered to them; and that inasmuch as the present bill seeks affirmative relief against their prior purchase, the bill should tender to them the eleven hundred dollars they paid, and interest upon it. The defense further claims that if mistaken in the amount the complainant should have offered to pay, the bill should at least have offered to refund the two hundred dollars received by Joseph C. and Ann Judson, and interest upon it.

A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the infant on becoming of age disaffirms the contract, then the adult purchaser or contractor will be forced to become the actor, to have the contract performed. In such cases the infant, or quondam infant, is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back any thing he may have acquired or received under the contract. The most that can be required of him is, that if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one, then, on demand or suit, he can be held to account for it. The rule is different when the contract has been executed. Then the quondam infant, or any one asserting claim in his right, must become the actor; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be

decreed to him. This is the difference between asking and resisting relief. Roof v. Stafford, 7 Cow. 179 (N. Y.); Hillyer v. Bennett, 3 Edw. Ch. 222 (N. Y.); Bartholomew v. Finnemore, 17 Barb. 428 (N. Y.); Smith v. Evans, 5 Humph. 70 (Tenn.); Mustard v. Wohlford, 15 Grat. 329 (Va.), 76 Am. Dec. 209; Bedinger v. Wharton, 27 Grat. 857 (Va.). But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made as a condition of recovering the property, but if the suit be in equity, and if the money or other valuable thing be still in *esse*, and in possession of the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so, if the infant has used or consumed it during his minority. * * *

The bill in the present case avers, and the proof sustains it, that the money received by Joseph C. and Ann Judson in the sale to Edwards, had been consumed and disposed of by them while they were minors. This relieved complainant of the duty of tendering, or offering to pay. If it did not, then the offer in the present bill would be insufficient. The offer is "to do equity, and to abide by and perform such things as, under equity and good conscience, may seem meet to entitle it to a decree for the cancellation of said deed." The offer should have been to refund the money, with interest. There was, however, no demurrer to the bill. Under no circumstances, would it be necessary for Joseph C. and Ann Judson to repay the money which had been paid to the other Burgins.

There is nothing in the argument that McDougal, Salmons and the Eureka Company had notice of the prior conveyance to Edwards. That conveyance conferred a legal title, or it conferred nothing. It is only when there is a prior right, legal or equitable, that notice actual or constructive, becomes material, to intercept or dominate an after acquired title. The disaffirmance of the sale made by the infants to Edwards, destroyed all his claim, both legal and equitable, which their deed had vested in him, and left in him no pretense of any equity, to assert against a later purchaser with notice.

The decree of the chancellor is reversed, and the cause remanded, that the complainant may have the relief prayed by its bill. It should be borne in mind that the deed to Edwards

and associates can be cancelled only as to Joseph C. and Ann Judson. The grantees are entitled to the custody and ownership of their deed, as against the other grantors. The deed should not, on its face, be marred or mutilated.

Division III.—Miscellaneous.

COURSOLLE v. WEYERHAUSER.

69 Minn. 328, 332. 1897.

MITCHELL, J. * * * The rule is that the act to be ratified must be voidable merely, and not absolutely void; and the question remains—which to our minds is the most important one in the case—whether the act of a minor in appointing an agent or attorney is wholly void, or merely voidable. Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to their interests, or were or might be beneficial to them. This threw upon the courts the burden of deciding in each particular case whether the act in question was necessarily prejudicial to the infant. Latterly the courts have refused to take this responsibility, on the ground that, if the infant wishes to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and contracts of the agent or attorney under such appointment, are absolutely void. This exception does not seem to be founded on any sound principle, and all the text-writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact. On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect

capacity, is only voidable, as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the old cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and confess judgment. In these cases the courts hold that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far as to hold that the judgment is good for no purpose and at no time. The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court. * * * Hence, notwithstanding numerous general statements in the books to the contrary, we feel at liberty to hold, in accordance with what we deem sound principle, that the power of attorney from plaintiff to Dorr, and the deed to Brown under that power, were not absolutely void because of plaintiff's infancy, but merely voidable, and that they were ratified by him after attaining his majority.

PART III

HUSBAND AND WIFE

CHAPTER VII.

INCEPTION AND NATURE OF MARRIAGE RELATION.

Civil or Social Position as a Disqualification.

STATE, APPELLANT, v. JACKSON.

80 Mo. 175. 1883.

Appeal from Cape Girardeau Circuit Court. Reversed.

HENRY, J. At the May term, 1880, of the circuit court of Cape Girardeau county, the defendant, a white woman, was indicted for having intermarried with Dennis Jackson, a person having more than one-eighth part of negro blood. A demurrer was sustained on the ground that the law on which the indictment was based, section 1540, Revised Statutes, 1879, is in conflict with the 14th amendment of the Constitution of the United States, as also with the 17th subdivision of section 53 of article 4 of the constitution of this State.

Section 1540, Revised Statutes 1879, is as follows: "No person having one-eighth part or more of negro blood shall be permitted to marry any white person, nor shall any white person be permitted to marry any negro or person having one-eighth part or more of negro blood; and every person who shall knowingly marry in violation of the provisions of this section, shall, upon conviction, be punished by imprisonment in the penitentiary for two years, or by fine not less than $100, or by imprisonment in the county jail not less than three months, or by both such fine and imprisonment; and the jury trying any such case may determine the proportion of negro blood in any party to such marriage from the appearance of such person."

We are unable to perceive any conflict between that section and the clause of our State constitution which declares that: "The general assembly shall not pass any local or special law regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding or inquiry before courts. * * *" It did not change the practice or jurisdiction or rules of evidence in any judicial proceeding or inquiry before any judicial tribunal. Besides, it is not a special or local but a general law, embracing all citizens of this State, white as well as black.

It may interfere with the taste of negroes who want to marry whites, or whites who wish to intermarry with negroes, but the State has the same right to regulate marriages in this respect that it has to forbid the intermarriage of cousins and other blood relations. If the State desires to preserve the purity of the African blood by prohibiting marriages between whites and blacks, we know of no power on earth to prevent such legislation. It is a matter of purely domestic concern. The 14th amendment to the Constitution of the United States, to which by some, magical power is ascribed, has no such scope as seems to have been accorded to it by the circuit court. It declares that: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside," and that "No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States."

Every Chinaman, Indian and Hottentot born in the United States and subject to its jurisdiction is, under the definition of a citizen, contained in the 1st section of the amendment, a citizen of the United States; and under the general sweeping declarations of the latter clause of that section it is necessary to determine what are the privileges and immunities of citizens of the United States. They are those secured to them by the Constitution of the United States and laws enacted in pursuance thereof. All of one's rights as a citizen of the United States will be found guaranteed by the Constitution of the United States. If any provision of that instrument confers upon a citizen the right to marry any one who is willing to wed him, our attention has not been called to it. If such be one of the rights attached to American citizenship all our marriage acts

forbidding intermarriages between persons within certain degrees of consanguinity are void, and the nephew may marry his aunt, the niece her uncle, and the son his mother or grandmother.

The act in question is not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same punishment for violation of its provisions by white as by colored persons, and an act of congress interfering with such legislation and declaring that it should be lawful in Missouri for a black man and a white woman, or a white man and a black woman, to intermarry would be without any binding force, because wholly unauthorized by any provision of the Constitution of the United States. In the Slaughter House Cases, 16 Wall. 36, the Supreme Court of the United States said with reference to the 5th section of the 14th amendment: "We doubt very much whether any action of a state, not directed by way of discrimination against the negroes as a class, will ever be held to come within the purview of this provision." In Minor v. Happersett, 21 Wall. 162, that court held that "the 14th amendment of the Constitution of the United States does not add to the privileges or immunities of citizens but only furnishes additional protection for the privileges already existing, and neither in the letter nor spirit of the constitution can a citizen find his right to intermarry with anyone whom he may select who is willing to accept him. The power of each state to regulate and control marriages within its jurisdiction, is as unquestionable as state sovereignty, and, as was observed by Buskirk, J., in the State v. Gibson, 36 Ind. 389 s. c.; 10 Am. Rep. 42; "If the federal government can determine who can marry in a state, there is no limit to its power. It can legislate upon all subjects growing out of this relation. It can determine the rights, duties and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorce. It may assume, exercise and absorb all the powers of a local and domestic character. This would result in the destruction of the states." 1 Bishop on Marriage and Divorce (4th ed.) 87; State v. Kennedy, 76 N. C. 251; s. c., 22 Am. Rep. 683.

It was held in Burns v. State, 48 Ala. 195; s. c., 17 Am. Rep. 34, that a statute of that state imposing a fine upon a justice of

the peace for solemnizing the rites of matrimony between a white person and a negro, was abrogated by the 14th amendment of the Constitution of the United States, and that decision is in conflict not only with the weight of authority on the subject elsewhere, but with a decision of the same court, reported in 42 Ala. 525, Ellis v. State.

If that amendment does not add to the privileges or immunities of citizens, in what other section of the constitution will the right of a white man to marry a negro woman, or a negro man to marry a white woman be found? Marriage acts similar to the one under consideration were in force in most of the slave-holding states prior to the adoption of the 14th amendment, and their validity was never questioned (United States v. Stanley, 109 U. S. 3; s. c., 22 Am. Law Reg. 790); no one supposing that there was, prior to that amendment, any provision of the federal constitution with which they were in conflict, and it is only by ascribing to that amendment a force and scope expressly denied it by the Supreme Court of the United States that any ground exists for questioning their validity now. Nor is it one of the natural rights of man to marry whom he may choose.

Under the Jewish dispensation persons nearly related by ties of blood intermarried, but in no Christian land are such marriages tolerated. The right to regulate marriage, the age at which persons may enter into that relation, the manner in which the rights may be celebrated and the persons between whom it may be contracted, has been assumed and exercised by every civilized and Christian nation; and the condition of a community, moral, mental and physical, which would tolerate indiscriminate intermarriage for several generations, would demonstrate the wisdom of laws which regulate marriage and forbid the intermarriage of those nearly related in blood. It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments.

The judgment of the circuit court is reversed and the cause remanded. All concur.

PACE v. ALABAMA.

106 U. S. 583. 1882.

Error to the Supreme Court of the State of Alabama.

§ 4184 of the Code of Alabama provides that "if any man and woman live together in adultery or fornication, each of them must, on the first conviction of the offence, be fined not less than one hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months. On the second conviction for the offence with the same person, the offender must be fined not less than three hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not more than twelve months; and for a third or any subsequent conviction with the same person, must be imprisoned in the penitentiary, or sentenced to hard labor for the county for two years."

§ 4189 of the same code declares that "if any white person and any negro, or the descendant of any negro to the third generation, inclusive, though one ancestor of each generation was a white person, intermarry or live in adultery or fornication with each other, each of them must, on conviction, be imprisoned in the penitentiary or sentenced to hard labor for the county for not less than two nor more than seven years."

In November, 1881, Tony Pace, a negro man, and Mary J. Cox, a white woman, were indicted, under section 4189, in a Circuit Court of Alabama, for living together in a state of adultery or fornication and were tried, convicted, and sentenced, each to two years' imprisonment in the State penitentiary. On appeal to the Supreme Court of the State the judgment was affirmed, and he brought the case here on a writ of error, insisting that the act under which he was indicted and convicted is in conflict with the concluding clause of the first section of the Fourteenth Amendment of the Constitution, which declares that no State shall "deny to any person the equal protection of the laws."

FIELD, J., delivered the opinion of the court, and after stating the case as above, proceeded as follows:

The counsel of the plaintiff in error compares §§ 4184 and 4189 of the Code of Alabama, and assuming that the latter

relates to the same offence as the former, and prescribes a greater punishment for it, because one of the parties is a negro or of negro descent, claims that a discrimination is made against colored persons in the punishment designated, which conflicts with the clause of the Fourteenth Amendment prohibiting a State from denying to any person within its jurisdiction the equal protection of the laws.

The counsel is undoubtedly correct in his view of the purpose of the clause of the amendment in question, that it was to prevent hostile and discriminating State legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected for the same offence to any greater or different punishment. Such was the view of Congress in the enactment of the Civil Rights Act of May 31, 1870, c. 114, after the adoption of this amendment. That act, after providing that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, declares in § 16, that they "shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offence for which the plaintiff in error was indicted when committed by a person of the African race, and when committed by a white person. The two sections of the code cited are entirely consistent. The one prescribes, generally, a punishment for an offence committed between persons of different sexes; the other prescribes a punishment for an offence which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. § 4184 equally includes the offence when the persons of the two sexes are both white and when they are both black. § 4189 applies the same punishment to both of-

fenders, the white and the black. Indeed, the offence against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.

Judgment affirmed.

STATE v. GIBSON.

36 Ind. 389. 1871.

Appeal from the Vanderburg Criminal Court.

BUSKIRK, J. It appears of record in this cause, that appellee was charged by indictment in the court below with having unlawfully and knowingly married, in the county and State aforesaid, one Jennie Williams, a white woman of this State, he then and there having one-eighth part or more of negro blood.

The indictment was, upon the motion of the appellee, quashed, and the State, by her prosecuting attorney, excepted and prosecutes this appeal to obtain a reversal of the judgment.

The indictment was based upon the forty-seventh section of the act defining felonies, which reads as follows:

"§ 47. No person having one-eighth part or more of negro blood, shall be permitted to marry any white woman of this State, nor shall any white man be permitted to marry any negro woman, or any woman having one-eighth part or more of negro blood, and every person who shall knowingly marry in violation of the provisions of this section, shall, upon conviction thereof, be imprisoned in the State's prison, not less than one, nor more than ten years, and be fined not less than one thousand nor more than five thousand dollars." 2 G. & H. 452.

The sole question which is presented for our consideration and decision is as to the correctness of the ruling of the court in quashing the indictment. It seems to be conceded by the appellee, that the indictment, under our code of criminal procedure, is good, in substance and matter of form, if the section of our

statute above quoted is still in force; but, it is earnestly maintained that all the laws of our State prohibiting the intermarriage of negroes and white persons were abrogated by the ratification of the fourteenth amendment of the constitution of the United States, and the passage of the civil rights bill. The position assumed by the attorney of the appellee is stated in these words:

"The appellee contends that all the laws of this State prohibiting the marrying of blacks and whites are abrogated by the fourteenth amendment to the constitution of the United States, and the law of Congress passed in pursuance to that amendment, which in express terms confers upon colored people the power of making contracts.

"Marriage by the laws of Indiana, being only a civil contract, 1 G. & H. 428, § 1, it follows that the marriage specified in this indictment was lawful; and hence the judgment of the court is correct."

The only question presented for the decision of this court is whether the position assumed by the appellee is correct. The magnitude and importance of the question involved cannot be over-estimated, and we have given it our best and most thoughtful consideration. We approach its investigation, profoundly impressed with the weight of responsibility that our oath to support the Constitution of the United States and of the State of Indiana has imposed upon us.

The first section of the fourteenth amendment is in these words:

"§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

This amendment was proposed by Congress, June 16th, 1866, and declared by the Secretary of State to have been ratified July 28th, 1868.

This amendment contains four separate and distinct propositions; first, it confers the right of citizenship upon all persons

born or naturalized in the United States, and who are subject to the jurisdiction thereof; second, it declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; third, it prohibits any State from depriving any citizen of life, liberty, or property, without due process of law; fourth, it provides that no State shall deny to any person within its jurisdiction the equal protection of the law.

It is settled by very high authority, that, in placing a construction upon a constitution or any clause or part thereof, a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief and the remedy. The court should also look to the nature and objects of the particular powers, duties, and rights in question, with all the light and aids of contemporary history, and give to the words of each provision just such operation and force, consistent with their legitimate meaning, as will fairly secure the end proposed. Kendall v. The U. S., 12 Pet. 524; Prigg v. The Commonwealth, 16 Pet. 539.

Guided by these wise and well settled rules of interpretation, we proceed to place a construction upon the section under examination. The persons referred to in the section under examination are described as "all persons born or naturalized in the United States." The race or class of persons intended to be benefited are not described. It is quite manifest that it did not refer to persons of the white race, for when persons of that race are born in the United States, they are by birthright citizens, and when they are born elsewhere, and have been naturalized under the law of Congress, they become citizens of the United States and of the State where they reside. We know from the history of the times that the main purpose of this amendment was to confer the right of citizenship upon persons of the African race who had previously not been citizens. When these persons became citizens, they were entitled to the privileges and immunities secured to all citizens by section two, of article four, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." But the framers and advocates of this amendment seemed to be unwilling to rely upon the above section, and therefore added

the other clauses which were intended to secure to the newly made citizens the full and equal protection of the law.

* * * * * * * * * *

The fourteenth amendment contains no new grant of power from the people, who are the inherent possessors of all power, to the federal government. It did not enlarge the powers of the federal government, nor diminish those of the States. The inhibitions against the States doing certain things have no force or effect. They do not prohibit the States from doing any act that they could have done without them. The constitution was made for the protection of all citizens. It is adapted to our condition in every State of our natural advancement. When new territory is acquired or new citizens created, the constitution extends itself over and protects the territory and citizens in the same manner that it extended over and protected the original thirteen States and the men who achieved our independence, and made the constitution, and formed the union of the States. From the Atlantic to the Pacific, and from the lakes to the borders of Mexico, it has stretched forth its cherishing arm over our people, and diffused its blessings on all alike. The only effect of the amendment under consideration was to extend the protection and blessings of the constitution and laws to a new class of persons. When they were made citizens they were as much entitled to the protection of the constitution and the laws as were the white citizens, and the States could no more deprive them of privileges and immunities than they could citizens of the white race. Citizenship entitled them to protection of life, liberty and property, and the full and equal protection of the laws. Nor has the ratification of this amendment in any manner or to any extent impaired, weakened or taken away any of the reserved rights of the States, as they had existed and been fully recognized by every department of the national government from its creation. This amendment conferred citizenship upon persons of the African race, but we will hereafter inquire and decide whether citizenship conferred on them the right to intermarry with persons of the white race.

But it is urged that the civil rights bill has abrogated the section of our statute which renders it a felony for a negro to marry a white woman in this State, or for a white man to marry a negro woman. It is claimed that the first section of the said

act, which confers upon persons of the African race the right to make and enforce contracts, has made it lawful for negroes, in all of the States, to make and enter into contracts of marriage with persons of a white race. The argument is, that under our laws marriage is a civil contract, and as negroes are authorized to make contracts, that, therefore, they can make any kind of contracts, notwithstanding the contract may be in violation of the laws of an independent and sovereign State. Waiving for the present the power of Congress to pass a law authorizing any class of persons to make and enforce contracts in a State, we proceed to examine the first section of the civil rights bill, and to determine whether the position assumed by the appellee is sustained thereby. In our opinion it is wholly untenable and that this is demonstrated by the plain, express and undoubted language of the said section.

The first section of the said act is in these words:

"That all persons born in the United States, and not subject to any foreign power, excluding Indians, not taxed, are hereby declared to be citizens of the United States; and that such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every state and territory in the United States to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white persons, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."

This act took effect on the 9th day of April, 1866, which was prior to the ratification of the fourteenth amendment. This amendment seems to have been mainly copied from, or modelled after the section above quoted from the civil rights bill. This section confers upon persons of the African race the power to make and enforce contracts. The power as conferred in the first part of the section is without limitations, but in the subsequent part of the section, it is restricted and qualified by the plain and express declaration, that the rights conferred shall be enjoyed

and exercised, in the same manner and to the same extent, "as is enjoyed by white persons." The only force and effect of this section was to confer upon persons of the African race the same civil rights, privileges, and immunities, as had been enjoyed by persons of the white race.

[The Court then considered the power of Congress under the federal Constitution, to pass a law regulating the institution of marriage in the States.]

* * * * * * * * * *

There can be no doubt that Congress possesses the power to determine who may, or may not, make contracts, and prescribe the manner of their enforcement, in the District of Columbia, and in all other places where the federal government has exclusive jurisdiction; but we deny the power and authority of Congress to determine who shall make contracts or the manner of enforcing them in the several States. Nor is there any doubt that Congress may provide for the punishment of those who violate the laws of Congress; but we utterly deny the power of Congress to regulate, control, or in any manner to interfere with the States in determining what shall constitute crimes against the laws of the State, or the manner or extent of the punishment of persons charged and convicted with the violation of the criminal laws of a sovereign State. In this State marriage is treated as a civil contract, but it is more than a mere civil contract. It is a public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, happiness and well-being of society. In fact, society could not exist without the institution of marriage, for upon it all the social and domestic relations are based. The right, in all States, to regulate and control, to guard, protect and preserve this God-given, civilizing, and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the States suffer or permit any interference therewith. If the federal government can determine who may marry in a State, there is no limit to its power. It can legislate upon all subjects connected with, or growing out of this relation. It can determine the right, duties, and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorces. It may assume, exercise, and absorb all the powers of a local and domestic character. This would result in the destruction of the

States. The federal government cannot exist without the States, but the States could exist without the federal government, as they did before its creation. There is no necessity for the destruction of either. The authority of the federal government begins where the authority of the State ceases. The State government controls all matters of a local and domestic character. The federal government regulates matters between the State and foreign governments. There is, and can be, no conflict between the State and federal governments, if each will act within the sphere assigned to each. The necessity for States and local self-government is shown by the character of our people. The customs, habits, and thoughts of the people in one State differ widely from those of the people in another State, and this results in different laws.

The laws of this State provide that males of the age of seventeen and females of the age of fourteen years, not within the prohibited degree of consanguinity, are capable of entering into the contract of marriage. The statute provides that the following marriages are void; when one of the parties is a white person, and the other possessed of one-eighth or more of negro blood; and when either is insane or idiotic at the time of the marriage. Under the police power possessed by the States, they undoubtedly have the power to pass such laws. The people of this State have declared that they are opposed to the intermixture of races and all amalgamation. If the people of other States desire to permit a corruption of blood, and a mixture of races, they have the power to adopt such a policy. When the legislature of the State shall declare such policy by positive enactment, we will enforce it, but until thus required we shall not give such policy our sanction.

The subject is discussed with great ability, clearness, and force, by the Supreme Court of Pennsylvania, in the recent case of the Philadelphia and West Chester R. R. Co. v. Miles, 2 Am. Law. Rev. 358, wherein it said:

"The right to separate, being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is whether there is such a difference between the white and black races within this State, resulting from nature, law and custom as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority.

Why the Creator made one black and the other white, we do not know, but the fact is apparent, and the races are distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect, and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures, when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races.

The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage.

But to assert separateness is not to declare an inferiority in either; it is not to declare one a slave and the other a freeman; that would be to draw the illogical sequence of inferiority from difference only. It is simply to say, that, following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but no less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

We fully concur in and indorse the doctrine above enunciated. It is quite clear to us, that neither the fourteenth amendment nor

the civil rights bill has impaired or abrogated the laws of this State on the subject of marriage of whites and negroes. The court erred in quashing the indictment.

The judgment is reversed, and the cause is remanded, with directions to the court below to overrule the motion to quash the indictment, and to place the appellee upon his trial for the crime charged in said indictment.

CHAPTER VIII.

EFFECT OF MARRIAGE ON THE PROPERTY RIGHTS OF THE PARTIES.

Earnings, Services and Society—The Husband's Right Under Statute.

FENEFF v. N. Y. CENT. & HUDSON RIVER R. R. CO.

203 Mass. 278, 80 N. E. 436, 24 L. R. A. (N. S.) 1024, 133 Am. St. Rep. 291. 1909.

Tort for the loss of consortium. Writ dated November 22, 1907.

The case came on to be tried before Gaskill, J. It appeared that the plaintiff was the wife of Antoine Feneff, who previously had brought an action for his own injuries and had recovered damages in accordance with an opinion of this court reported in 196 Mass. 575. By a stipulation of the parties it was agreed that the evidence introduced by the plaintiff was the same as that in the case of her husband. There was evidence in support of all the material allegations in the plaintiff's declaration.

At the close of the plaintiff's evidence, the judge ruled that the plaintiff could not maintain her action, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

KNOWLTON, C. J. The plaintiff's husband was injured physically and mentally by the negligence of the defendants, and he has recovered full compensation for his injuries. Feneff v. Boston & Maine Railroad, 196 Mass. 575, 82 N. E. 705. The plaintiff sues for damages suffered by her from his injury, by reason of her relation to him as his wife. In her declaration she avers that, by reason of his disability, she has endured great suffering and anxiety, and has been obliged to assume heavy and arduous duties which she did not have to assume before the injury, and that she has lost the comfort, society, aid and assist-

ance of her husband. In her bill of exceptions she says that the action is "for the loss of consortium." This statement covers the case; for it is plain that the other averments in her declaration do not show an invasion of a legal right, nor anything more than a remote and consequential damage which did not result from any wrong done directly to her.

The right of consortium is a right growing out of the marital relation, which the husband and wife have, respectively, to enjoy the society and companionship and affection of each other in their life together. At the common law, the husband had a right to the labor and services of his wife, and in suing for the damages which are personal to the husband for an injury to his wife, he was permitted to recover not only for the expenses of her care and cure, but for his loss of her labor and services and the loss of consortium. Kelley v. N. Y., N. H. & H. R. R., 168 Mass. 308, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397, and cases there cited. It is said in that case, and in Nolin v. Pearson, 191 Mass. 283, 286, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, that a wife could not maintain an action at common law for the loss of consortium of her husband. The reason of this was that she could not sue in her own name for a personal injury, and that a recovery for such a wrong could only be had in a suit brought jointly by her and her husband. The right to the consortium of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favor of each. Since the removal of the wife's disability to sue, this is now settled in most courts by a great weight of authority. Nolin v. Pearson, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, and cases cited. It is now generally held, in accordance with the decision in Nolin v. Pearson, that, for a direct and intentional invasion of a wife's right of consortium by another woman, through the alienation of the husband's affections and criminal conversation with him, an action may be maintained, as a similar action may be maintained by a husband for a similar wrong inflicted through adultery with his wife. Formerly a wife could not maintain such an action, because her suit could only be brought by her husband, with whom she must join. The husband's own misconduct would ordinarily be a sufficient reason to prevent his bringing such an action, if, indeed, it would not bar him, in most

cases, from maintaining an action against a joint wrongdoer. The change of the statutes in this Commonwealth and similar changes in most other jurisdictions have given wives the same right as husbands to sue an offender for a wrong of this kind.

The wrong which may be redressed through such suits is one which has a direct tendency to deprive the husband or wife of the consortium of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury. The actions by husbands at common law for expenses and loss of services, in which the loss of consortium has been considered in estimating damages, were all in cases in which no damages could be awarded for loss of the ability to earn money and render services and be helpful to others, in an action by the husband and wife for the wife's personal damages, because at common law all these elements of damage belonged to the husband. See cases cited in Kelley v. N. Y., N. H. & H. R. R., ubi supra. There was not an allowance to the wife for her loss of ability to earn wages and render services, and at the same time an allowance to the husband, in the form of compensation for the loss of consortium for the same diminution of ability to be helpful.

Where there is no intentional wrong, the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily the relation between him and others, whereby they will be detrimentally affected by the impairment of his physical or mental ability, makes the damage to them only remote and consequential, and not a ground of recovery against the wrongdoer. It may be conceivable that one may have a contractual right to the labor or services of another, continuing after the time of his injury, such that, if his ability

is impaired, the contractor will be directly damaged. If there may be such a case it is unnecessary to consider whether the contractor with such a right should have his action for damages and receive his proper share of the amount allowable for the impairment of the other's earning powers, and the damages of the other be diminished accordingly. It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation to which he is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be made the subject of an action.

The minor children of an injured father who is legally bound to furnish them with support may suffer indirectly from his injury. So too may his wife, to whom he owes the same legal duty to furnish support; yet it was never held that a wife or minor child could recover for the consequences of a father's disability, against one who had negligently injured him. The diminished value of the husband's consortium with his wife, in such a case, is like the diminished value of the work that the husband can do for the support of his wife and the education and support of his minor children. The negligent defendant is supposed to have made full pecuniary compensation to the husband and father for his injury. In the benefit from this payment the wife and children may be expected to share to some extent. If they still suffer loss, it is not direct, but only consequential.

The case most relied on by the plaintiff, and the only one that comes near to supporting her contention, is Kelley v. N. Y., N. H. & H. R. R., ubi supra. In that case actions of the husband and wife for an injury to the wife were tried together, and the damages in the two suits were assessed at one time by the same jury. It is said in the opinion that "it might be sufficient to dispose of this case to say that the plaintiff was bound to support his wife, and that the expenses incurred by him appeared to have exceeded the amount of the verdict, and that therefore the defendant's exceptions should be overruled." In assessing the damages the jury were permitted to consider the loss of consortium by the husband, and the court held that there was

no error. It seems from the verdict that the defendant suffered no injustice in the amount of damages awarded, and doubtless the court scrutinized less closely the narrow legal question involved than it would have done if it had been called upon to consider whether an action for loss of consortium alone could be maintained in a suit for negligence, when there had been a full recovery by the person injured for all the mental and physical effects of the injury. We are of opinion that in this class of cases there should be no recovery for loss of consortium, when the impairment of the powers and faculties of the plaintiff's spouse has been fully paid for in money. Indirectly, the plaintiff in such a case reasonably may be expected, through the same marital relation which gives a right of consortium, to be somewhat benefited by such a payment.

The doctrines stated in the case just cited are not to be applied to cases like the present, and to this extent the decision is overruled.

Exceptions overruled.

Earnings, Services and Society—The Wife's Right.

KROESSIN v. KELLER.

60 Minn. 372, 62 N. W. 438, 27 L. R. A. 685, 51 Am. St. Rep. 533. 1895.

COLLINS, J. This is an action brought by a married woman against one of her own sex to recover damages, following, in a general way, the common law form of declarations in crim. con. A general demurrer to the complaint was overruled in the court below, and by this appeal we are required to determine whether such an action can be maintained; the right to recover being based solely on alleged adulterous acts between plaintiff's husband and the defendant. It is to be noticed here that it is not alleged that the defendant was the seducer of the husband, or that plaintiff has been deprived of his support; nor is it an action for enticing the husband away, or for inducing him to abandon or desert his wife. We are quite safe in saying that at common law no such action could have been maintained. The injured husband alone brought crim. con., and he could sustain

the action by simply showing adulterous intercourse. The grounds on which the right to recover was based are well stated in Cooley on Torts, 224, and the principal elements were the disgrace which attached to the plaintiff as the husband of the unfaithful wife,—and no such disgrace has ever rested upon the wife, if there was one to the guilty defendant,—and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but, still worse, cast discredit upon the legitimacy of those really begotten by him. Because of these elements, the man was always conclusively presumed to be the guilty party. In the eye of the law, the female could not even give her consent to the adulterous acts, and, as a result, it was no defense in this form of action that the defendant had been enticed into criminal conversation through the acts and practices of the woman. From this statement as to the grounds or elements constituting this action, it will be seen that the principal ones cannot possibly exist or be involved in a similar action brought by a wife. And what has been said about the unavailability of the defense that the defendant himself was the victim and not the seducer, is suggestive of what the courts might have to hold to be the rule of pleading, and what they might have to inquire into, upon the trial of an action of this kind. Would it be held, following the old rule we have mentioned, and for which the reason seems well founded, that it was no defense for the female sued to allege and prove that she was the party seduced, and that the greater wrong and injury had been inflicted upon her, not upon the plaintiff wife, or would the contrary rule prevail? But we need not consider the subject further, for a moment's reflection will suggest the remarkable results flowing from the adoption of either rule.

We have been cited to quite a number of cases, determined in the courts of last resort in this country, in which it has been held, without much stress being laid on statutes concerning the rights of married women, that an action may be maintained by a wife against one who wrongfully induces and procures her husband to abandon or send her away. Westlake v. Westlake, 34 Ohio St. 521, 32 Am. Rep. 397, the court being divided in opinion, is a leading case on this view of the subject. A later one, announcing the same doctrine, but made to rest much more

on the married woman's acts in the state of Michigan, and similar to our own, is Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545. The plaintiff's counsel has been industrious in collecting this class of cases in his brief, and to them we add Price v. Price, 91 Iowa 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360. But even on this proposition and despite broad statutory enactments affecting the rights of married women, the courts are not entirely agreed, for in Maine and Wisconsin it has been held that such an action cannot be maintained. Doe v. Roe, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499; Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79. But we need not decide, as between these cases, for the exact question raised by the demurrer here was not the one under consideration in any we have cited. They were brought for enticing away the husband; causing him to withdraw his support from the wife; to abandon or desert her,—an entirely distinct and separate cause of action from that set out in the plaintiff's complaint. At common law this form of action was wholly different in pleadings and proof, as well as parties, from crim. con. It proceeded, and still proceeds, upon different grounds, and we do not regard cases of that nature as authority in this. We are not unmindful of the fact that plaintiff's counsel has presented two cases—Seaver v. Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597, and Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213—in which it is held that an action by a wife against another woman, based on a complaint very much like this, will lie. But in these cases the authorities before referred to are cited and relied on as directly in point. The courts rendering these decisions do not seem to have considered that there is, and inevitably must be, a marked distinction between an action charging a defendant with having induced and enticed a husband to withdraw his support from his wife to abandon and desert her and one similar to crim. con. We think the difference noticeable and material although we do not wish to be understood as holding that the one first mentioned will lie. That question is not before us, and we simply express our conviction that a wife would "seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured." The

power to bring such actions would furnish wives "with the means of inflicting untold misery upon others, with little hope of redress for themselves." We find nothing in our statutes in respect to the rights of married women which indicates that the power to proceed in this form of action was intended to be conferred. Attention has been called to Gen. St. 1894, § 5530 (Laws 1887, c. 207, § 1). We have heretofore had occasion to comment upon that act, and have not changed our views as then expressed. Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616.

Order reversed.

CHAPTER IX.

DUTY OF THE HUSBAND TO SUPPORT WIFE.

Authority of the Wife to Pledge Husband's Credit.

DOLAN v. BROOKS.

168 Mass. 350, 47 N. E. 408. 1897.

Contract to recover the price of a dress furnished by the plaintiff to the wife of the defendant. The case was tried without a jury. There was evidence tending to support the claim. The defendant testified that he never had any business transactions with the plaintiff; that his wife had a separate income from which for about ten years she had paid for her clothing; that she had traded with plaintiff for three or four years, paying her bills with her own checks, but that he had paid for some clothing contracted for by his wife; that he paid substantially all the bills for the maintenance of his household except the clothing bills for his wife and daughters. The wife's previous purchases from the plaintiff had been paid for by the wife with her own checks.

At the close of the evidence the plaintiff requested the judge to rule among other things, as follows: That the fact that the wife had a separate income—such fact being uncommunicated to the plaintiff—does not release the husband from his liability to pay for goods suitable to the wife's station in life, supplied by the plaintiff to the wife while husband and wife were living together.

With respect to this request the judge ruled that the non-communication to the plaintiff of the fact that the wife had a separate income was immaterial. The judge found for the defendant and the plaintiff excepted.

MORTON, J. * * * It is not contended that the wife had express authority from the defendant to purchase the dress. The plaintiff relies on the obligation which a husband is under

to furnish his wife with necessaries suitable to her station in life, and on the authority which she has by law, in case of his neglect to do so, to purchase them on his credit. The question is whether, under the circumstances of this case, the defendant is liable on that ground. A wife has not authority to purchase on her husband's credit such clothing as she deems suitable and proper. Generally speaking, it is only in cases of necessity that the law constitutes her his agent with authority to pledge his credit. This is the law in England, as well as here. Raynes v. Bennett, 114 Mass. 424; Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532; Debenham v. Mellon, 6 App. Cas. 24; Jolly v. Rees, 15 C. B. (N. S.) 628. It is possible that the husband's consent to or acquiescence in the doing of certain things by the wife may constitute her his agent *quoad* such matters. Such an agency may be presumed, perhaps, under some circumstances, in regard to those things relating to the family, for instance, which it is usual for the wife to do, and which she does without any question or objection on the part of her husband. Debenham v. Mellon, ubi supra. This case, however, as already observed, stands on a different ground from either of those just referred to.

The defendant and his wife were living together, and he paid all the expenses for the maintenance of the household, except those for the clothing of his wife and daughters. The bulk of those was paid by the wife out of her income. She had been accustomed for ten years to do this, though the defendant had paid some bills for clothing contracted by her in his name. For aught that appears, her income was sufficient to clothe her suitably according to her station in life, and it fairly may be assumed that it was understood between them that it should be used by her in this manner. We do not see how, under such circumstances the defendant can be held liable. Assuming that the dress was suitable according to her station in life, it does not appear that the defendant had refused or neglected to provide his wife with suitable clothing, and consequently one of the essential grounds in which the law raises an agency in the wife's favor to bind the husband was wanting. Further, the judge who heard the case may have found that, although the dress was suitable, it was not necessary.

We do not mean to intimate that the fact that a wife has an

income of her own relieves the husband from his obligation to support her, or absolves him from liability for suitable clothing bought by her in consequence of his refusal or neglect to provide it for her. It is not necessary to decide that question now. See Thorpe v. Shapleigh, 67 Me. 235; Liddlow v. Wilmot, 2 Stark. 86.

The rulings asked for assumed in one form or another that the defendant was liable. As we do not think that he is, it is unnecessary to consider them in detail. The modifications which the judge made in the fourth and sixth rulings asked for were rightly made.

Exceptions overruled.

Changes Produced By Statute—Family Expense.

HYMAN v. HARDING.

162 Ill. 357. 1896.

CARTWRIGHT, J. In November, 1888, Adelaide Harding, wife of defendant in error, purchased a ring of plaintiffs in error, and suit was brought against both husband and wife for the purchase money. Plaintiff's declaration consisted of the common counts in assumpsit and a special count under the statute, making both husband and wife chargeable with family expenses. On the trial the common counts were withdrawn from the consideration of the jury. On the claim under the statute the verdict of the jury was against both defendants, and judgment was entered accordingly. Defendant in error alone appealed, and the judgment was reversed, without remanding, by the Appellate Court, which found as a matter of fact, and entered in its judgment that the purchase price of the ring was $575, that it was a ruby and diamond ring, and that it was purchased without authority from the husband. A certificate of importance having been granted, the cause was brought to this court.

On the trial Adelaide Harding, co-defendant with her husband, was permitted to testify against his objection, and she testified that the diamond setting was lost from her wedding ring, which originally cost $65, and that she had the ring re-set with diamonds and a ruby, costing $575, and it is insisted that the

preservation of the wedding ring is a different class of expense from the purchase of an ordinary ring. But this testimony was incompetent and erroneously admitted. The court said that it was admitted only to bind her; but the action was a joint one against the husband and wife, and there could be no verdict against one without the other. Whatever would tend to establish the claim and conduce to a verdict against her would affect him in like manner. There was no competent evidence that any part of the ring sued for had ever been part of a wedding ring, and it must be treated as any other ring, for mere personal gratification and adornment.

Section 15 of chapter 68 of Hurd's Statutes is as follows: "The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." Under the findings of fact by the Appellate Court, the inquiry in this court is whether a ring is a family expense.

The statute has been construed in Iowa, from which State it was taken, and elsewhere, to embrace merely legitimate expenses of the family, as such, incurred for articles to be used in the family, and actually used or kept for use therein. (Fitzgerald v. McCarty, 55 Iowa 705). The term "expenses of the family" is not synonymous with "necessaries," which may be personal and individual as well as for the family. It does not include business expenses, which are incurred merely to secure the means to maintain the family, nor private or individual expenses, which do not affect the collective body of persons under one head constituting a household or family, but it does include expenses for many articles used by individual members of the family, if they mutually affect the members generally. It is apparent that even though an article is purchased for and used by only one member of the family, yet it is a family expense if it conduces, in any substantial manner, to the welfare of the family generally. Musical instruments may be as pleasant and beneficial to the other members of the family as to the operator. Books, pictures and articles of ornament used to adorn and beautify the home, though owned by individual members of the family, are beneficial to the family generally, and tend to maintain its integrity. Articles of clothing, though purchased

for and used exclusively by individual members, are family expenses, as they contribute, in a substantial manner, by preserving health and otherwise to the general well being of all the members. It is equally apparent that an article is not a family expense if it in no way conduces to the welfare of the family generally, even though at times it is used or displayed by the one for whom it was purchased in the family. We think that a ring falls within this class. It is for personal adornment, largely to gratify vanity, and, though it may be incidentally worn in the family, its primary and important use is for display in general society.

The case of Marquardt v. Flaugher, 60 Iowa 148, is cited by plaintiffs in error; but in that case, which involved a watch and chain, a ring and some other jewelry, neither the lower court nor the Supreme Court held that the ring was a family expense. The judgment in the lower court was of such an amount that it is a warrantable inference that it did not include the ring, while the Supreme Court impliedly, if not directly, stated that the ring was not a family expense. As to the watch and chain, it may be said that a watch is, primarily at least, for use, and in the family as much as elsewhere. It is usually beneficial to the family, as such, though worn only by one, while a chain may be, in prudence, a proper adjunct to a watch.

It is insisted the cause should have been remanded by the Appellate Court to enable plaintiffs to try the cause on the common counts; but as the common counts were withdrawn on the trial, the only question related to the liability for expenses of the family, and this, we think, the Appellate Court properly determined, and its judgment will be affirmed.

Judgment affirmed.

CHAPTER X.

CONTRACTS OF MARRIED WOMEN.

In Equity.

YALE v. DEDERER.

22 N. Y. 450, 78 Am. Dec. 216. 1860.

SELDEN, J. * * * To dispose of this case, therefore, we have only to ascertain whether a married woman having, prior to the statutes of 1848 and 1849, a separate equitable estate, could create a charge upon the estate, by giving a promissory note for the debt of her husband, intending thereby to charge her estate, but without indicating this intention in any manner by the contents of the note. It was settled, when the case was here before, that the bare giving of such a note did not bind the estate. It becomes necessary now to inquire whether the additional fact, that the wife, at the time of making the note, intended to charge her separate estate, changes the rule.

Much has been said, in the course of the decisions on this subject, in regard to the intention of the wife at the time of making the contract; and in order properly to appreciate the force of these remarks, a brief retrospect of the law of separate estates is required. I shall not attempt a review of the cases, confused and contradictory as some of them are, but desire to call attention to one or two features of the controversy carried on in the English courts for nearly a century, and which can hardly even now be considered as ended, in regard to the effect of the contracts of married woman upon their separate estates. If the instrument by which the estate was created, conferred upon the wife either a general or qualified power of disposition, no one ever questioned her rights to execute this power; the doubts which arose, related to her right to dispose of or charge the property, independently of any such special authority; and this right was established soon after the introduction of such estates,

upon the ground that the right of disposal was a necessary incident of the right of property.

That this universal jus disponendi was the sole and only foundation of the right in question is clear. Lord Thurlow, in the case of Fettiplace v. Gorges, 3 Bro. C. C. 8, places the right upon this ground, and no other basis has ever been suggested for it. Assuming this then to be the foundation of the right, it is plain that the wife, to avail herself of it must make some disposition of the specific property itself. It is clearly impossible to deduce, from the jus disponendi, which accompanies all rights of property, power to make any contracts, except such as related directly to the property to which the right of disposition is attached; and yet the Master of the Rolls, in Norton v. Turvill, 2 Pr. W. 144, and in Standford v. Marshall, 2 Atk. 69, held the separate estate of a married woman liable for the payment of her bond, although the bond in no manner referred to such separate estate; and in the latter case was given for the money lent to the husband.

The reasoning upon which these cases are said to have proceeded, and upon which they were followed by Lord Thurlow, was this: That it being the rule in equity, that a wife who had a separate estate might deal with such estate in the same manner as if she were sole: it followed that such estate was liable for her engagements, in the same manner as it would be if she were a feme sole. The equitable rule, which being founded entirely in the right of the wife to dispose of her property, could go no further than to allow her to make contracts specifically appropriating or charging her separate estate, was thus expanded, so as to enable her to contract generally without in any manner referring to such estate. The doctrine was justly characterized by Chancellor Kent in the case of the Methodist Episcopal Church v. Jaques, 3 Johns. Ch. 77, where, speaking of the two cases to which I have referred, among others he says: "It is difficult to perceive upon what reasoning or doctrine the bond or parol promises of a feme covert could for a moment to be deemed valid. She is incapable of contracting according to the 'common right', mentioned by Lord Macclesfield; and if investing her with separate property, gives her the capacity of a femme sole, it is only when she is directly dealing with that very property. The cases do not pretend to give her any of the

rights of a feme sole in any other view, or for any other purpose."

But, although Lord Thurlow followed, as we have said, what he supposed to be the rule established by the cases referred to, he nevertheless saw the fallacy upon which those cases were based, as appears by his remarks in the case of Hulme v. Tenant, 1 Bro. C. C. 16, the leading case on this subject. There the separate estate of a wife was held liable for the payment of her bond given for money borrowed by her husband, and the residue by herself. After referring to the previous cases, Lord Thurlow says: "I take it, therefore, it is impossible to say, but that a feme covert is competent to act as a feme sole with respect to her separate property, when settled to her separate use; but the question here goes a little beyond that; it is only how far she may act upon her separate property. I have no doubt about that; but the question is, how far her general personal engagements shall be executed out of her separate property." Still, although thus clearly seeing the distinction which ought, as it would seem, to have been decisive against the claim; he, nevertheless, yields to the authority of the previous case, and holds the separate estate liable.

The debt in the last case, as well as in the previous cases of Norton v. Turvill, and Standford v. Marshall, was by bond. But it is obvious, that if the principle upon which they were based was sound, it embraced every debt of the wife, however created; whether by bond, note, or by a mere oral promise; and so the doctrine was subsequently applied by Lord Thurlow himself in the case of Lilia v. Airey, 1 Ves. 277. It is true, that in this case the separate estate consisted of a specific sum allowed by the husband to the wife, by way of separate maintenance, and resort has been sometimes had to that fact as explaining the decision. But no reliance is placed upon this circumstance by Lord Thurlow, nor could it properly affect the result. The decision was the legitimate consequence of the theory of the wife's liability adopted in the previous cases.

But the unsoundness of this theory was soon discovered, and it was rejected two years afterwards, in the case of Bolton v. Williams, 2 Ves. 139, by Lord Chancellor Loughborough, who denied the liability of a married woman's separate estate for her general parol engagements, and explained the previous cases

upon the ground, that the securities which the wife had executed operated as appointments of her separate property, that is, as appropriations or pledges of such property for the payment of the debt for which the security was given.

This new theory that a written security was an appointment was as plainly erroneous as that for which it was substituted. It was evidently a pure fiction. The doctrine proceeded upon the assumption that a wife's separate estate is not liable for her general engagements, but only for such as are specifically charged upon it, and yet held it liable for a bond or note, which in no manner referred to such estate. If these written securities operated as appointments, then it must necessarily follow that every such security would create an equitable charge or lien upon the estate, from the time of its execution; still, they were uniformly treated not as specific liens, but as mere general debts, having no priority over other and later claims. It was expressly held by Sir John Leach, Master of the Rolls, in an anonymous case (18 Vs. 258), where the questions arose, that in such cases there was no priority, and that all the debts must be paid equally.

But, notwithstanding these inconsistencies, this doctrine that a written security was an appointment and a charge, while it was otherwise with a mere parol promise, was maintained substantially unchanged, from the time of its introduction by a Lord Loughborough, in Bolton v. Williams, until the case of Murray v. Barlee, 4 Sim. 82, when Lord Brougham rejected the distinction between a written security, and a promise by parol, and extended the rule so as to make the mere parol engagements of a wife a charge, as well as her bond or note. Speaking on that subject, he says: "I own I can conceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife in equity is taken as a feme sole, and can charge it by instruments absolutely void of law, can there be any reason for holding that her liability, or more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds, and to require writing where the act requires none? Is there any equity reaching written dealings with the property which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money

furnished to squander away at play, be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."

It is impossible to deny the force and conclusiveness of this reasoning. The distinction which it combats, was clearly untenable. But the learned Chancellor was, I think, less successful in another part of the same opinion in which he attempts to explain the ground upon which it had been previously held, that the bond or note of a married woman, and upon which he held that all her engagements, whether in writing or by parol, were charged upon her separate estate. He says that although originally the courts supposed that, to affect the separate estate, there must be some real charge, as a mortgage, or an instrument amounting to the execution of a power, afterwards the intention of the wife "was more regarded, and the court only required to be satisfied that she intended to deal with her separate property." The reasoning by which her intention was supposed to be established was, that when a married woman gives her bond or note, or contracts a debt in any other manner, it must be presumed that she intended it to have some effect; and inasmuch as it is void at law, and can have no effect unless it is a charge upon her separate estate, it follows that she must intend it to be such a charge.

The intention here spoken of is not an intention which is proved by extraneous evidence dehors the contract, but an intention which is to be inferred from, and is therefore embraced in or manifested by, the contract itself. No court has ever held or intimated that parol evidence was admissible to prove that the bond or note of a feme covert was intended to be a charge upon her estate. To permit this would be in direct conflict with the rule which excludes all parol evidence offered to explain a written instrument. The intent, to be of any importance, must be a part of the contract: that is, the true meaning of the contract when justly interpreted must be, that the debt which it creates should be a charge upon the estate. This case, therefore, is not materially strengthened on the part of the plaintiff by the finding of the judge, that the defendant intended the debt to be a charge, as that intention, if it existed, forms no part of the note, which must be regarded as the only evidence of the contract.

But the reasoning of Lord Brougham in Murray v. Barlee has been since overthrown, and the doctrine based upon it is not now the doctrine of the English courts. In the case of Owens v. Dickenson, 1 Craig. & Ph. 48, Lord Chancellor Cottenham appears to have seen that there could be no real foundation for the assumption that because a married woman had executed a bond or note, or contracted a debt in any other form, therefore she must have intended to charge such debt upon her separate estate. He first shows, what, indeed, is very plain, that if the doctrine is sound, then every debt must become a specific lien upon the separate estate to be paid in the order of its priority: while Lord Brougham held that such debts are all to be *pari passu*. He then argues, very conclusively, to prove that a contract which is entirely silent as to the separate estate, and makes no reference whatever to its existence, cannot by any legal reasoning be shown to have been intended as a disposition of such estate.

After thus removing the only ground upon which every English Chancellor, from Lord Loughborough to Lord Brougham, had held a bond or note, and upon which the latter had held every other contract to create a charge, Lord Cottenham proceeds to inaugurate an entirely new doctrine on the subject, which is, that equity lays hold of the separate property, and appropriates it to the payment of the debt; not on account of anything contained in the contract; not because the wife, by any agreement, either express or implied, has made the debt a charge; but for reasons which I will give in the learned Chancellor's own words: "The separate property of a married woman, being a creature of equity, it follows, that if she has a power to deal with it, she has the other powers incident to property in general, namely: the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."

This is by no means a return to the primary doctrine of the English courts on this subject. Lord Thurlow never suggested that equity had any power to take the separate property of a married woman and appropriate it to the payment of debts

which she had never in any manner charged upon it. It is an attempt to support, by an entirely new process of reasoning, a course of decision which Lord Cottenham plainly saw could not be sustained upon any of the grounds upon which it had been previously placed.

But whether we adopt this last phase which the shifting doctrine in respect to wife's separate estate has assumed or not, it is certain that the judgment in the present case cannot be upheld. As was shown by Judge Comstock when this case was here before, mere equity, not resting upon any positive contract, will never seize upon the separate estate of the wife, and appropriate it to the payment of a debt of the husband, for which she is mere surety; and it follows from what has been previously said, that the estate of the defendant cannot be held liable upon this note, upon the ground that she intended to make it a charge; because to make such an intent of any importance, it must be either expressed or implied in the terms of the contract.

But I am unwilling to leave it to be inferred that I assent to the doctrine of Lord Cottenham. It seems to me even less defensible than the theories which preceded it. Those theories conceded, that the separate estate of a feme covert could not be appropriated in payment of her debt, unless she voluntarily charges such a debt upon her estate. Their error consisted in raising an implication of an actual appointment of charge upon wholly insufficient grounds. But Lord Cottenham's doctrine denies the necessity of any intentional charge of the debt at all by the wife upon her separate estate, although it at the same time makes her power to dispose of that estate the basis of its liability. His argument, when reduced to its simplest terms is, that a married woman who has a separate estate, has power in equity to charge any debt she may incur upon such estate; and inasmuch as the general creditors of such married woman, whose debts have not been thus charged, have no other means of collecting them, equity takes hold of the separate estate, and appropriates it to their payment.

Can this be sound? I am unable to see any logical connection between the premises and the conclusion. It may be very just, abstractly considered, that equity should thus dispose of the estate; but it is clearly impossible to deduce the doctrine from the jus disponendi of the wife, which is its only foundation.

The truth would seem to be that this mode of dealing with the estates of married women, to the extent to which it has been carried by the English courts, could not be sustained by any process of legal reasoning, and hence the grounds upon which it was made to rest have been repeatedly changed, and the rule itself has been fluctuating and uncertain.

These views are not new. Judge Story, in his work on Equity Jurisprudence, says: "It has been remarked, that this rule of holding that a general security, executed by a married woman, purporting only to create a personal demand, and not referring to her separate property, shall be intended as prima facie an appointment or charge upon her separate property, is a strong case of constructive implication by courts of equity, founded more upon a desire to do justice, than upon any satisfactory reasoning."

The courts of this State have never, as yet, adopted the doctrines of the English Court of Chancery on this subject; certainly not to their full extent: and it would in my view be inexpedient now to do so, for various reasons. If we attempt to follow a class of decisions which obviously rest upon no solid basis of principles, we can never arrive at any settled conclusion.

The views of Lord Cottenham are no more likely to be permanent than those of his numerous predecessors. Some future Lord Chancellor may detect the fallacy of his reasoning as he detected that of Lord Brougham. No rule can ever be stable, the reasons given for which are constantly changing. If we desire precision and certainly in this branch of the laws, we must recur to the foundation of the power of a feme covert to charge her separate; and this has heretofore arisen solely from her incidental power to dispose of that estate. Starting from this point, it is plain, that no debt can be a charge which is not connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate itself, it would, of course, become a lien; upon a well founded presumption that the parties so intended and in analogy to the doctrine of equitable mortgages for purchase money. But no other kind of debt can, as it seems to me, be thus charged without some affirmative act of the wife evincing that intention; and there is no reason why her acts in this respect should not be

tested by the same principles and rules of evidence which are applied to similar questions in other cases.

But there is a strong additional reason why this court should decline at this time to adopt the fictitious theories in this subject which have so long prevailed in the English courts. Married women are not hereafter to be indebted to equity merely for protection in the enjoyment of their separate estates. They hold them by a legal title and have a legal right to dispose of them. The acts of 1849 and 1860 are henceforth, if not repealed, to be the source of their power over such estates. There is no longer any foundation for the argument, that as equity creates and protects these estates, equity has a right to control them. Rules, therefore, which have grown up under this idea, which I regard as to some extent illusory, will be hereafter entirely inappropriate. I shall not attempt at this time to put a construction upon those acts. That of 1860 authorizes married women to carry on any trade or business upon their own account; but with this exception, the only contracts which it empowers them to make, are those which have direct reference to their separate property: and even this power, where the property consists of real estate, is subjected to a very important restriction; the consent in writing of the husband, or the authority of a court, being rendered essential to its exercise.

These provisions show that the legislature has not even now intended to remove the common law disability of married women to bind themselves by their contracts at large. To be obligatory upon them or their estates under our latest statute, their contracts must relate entirely to their separate property, or to the particular trade or business in which they are engaged. This legislation harmonizes with the views I have advanced in regard to the effect of the contracts of married women. It lends no countenance to the idea that the mere possession of separate estates renders their contracts having no relation to such estates binding upon them. It would be impossible, as it seems to me, to hold, under our statutes, that the mere execution of a security by a married woman not connected by agreement with her estate could be a charge upon it; and yet the power of disposal conferred by these statutes, is, to say the least, as complete as that previously possessed by married women by virtue of the jus disponendi, which resulted from mere ownership. There would,

therefore, be a manifest incongruity in holding, in the present case, that prior to our late statutes the debt of a feme covert not connected with her separate estates, not in any manner charged by contract upon it, could be enforced against it, and then deciding, as we evidently must, that under those statutes an actual charge is necessary.

The judgment of the Supreme Court should be reversed, and there should be a new trial, with costs to abide the event.

All the judges concurred; COMSTOCK, C. J., and DENIO and BACON, JJ., upon the ground that the case as now presented did not vary from that when here before. A majority concurred in the opinion that the intention to charge the separate estate must be stated in the contract itself, or the consideration must be one going to the direct benefit of the estate.

Judgment reversed, and new trial ordered.

CHAPTER XI.

CONVEYANCES AND DEVISES OF MARRIED WOMEN.

Conveyances—at Common Law.

LANE v. SOULARD.

15 Ill. 123. 1853.

The bill alleges: That Soulard conveyed certain property in St. Louis to trustees, to hold in trust for appellant, a married woman, provided she shall pay out of her separate estate, the sum of $9,000, payable in four installments; that said Soulard agreed to complete the improvements then in progress, by the 1st of October, 1846; that to secure the payment of the first installment more fully, being $2,000, to be paid 1st October, 1846, the appellant and her then husband executed a deed of trust to a part of the defendants, as trustees for certain lands in Illinois, owned in her right, which authorized the sale of said lands, on the failure to pay said first installment, and out of the proceeds to pay, first, the cost, and then the sum of $2,000; that upon the failure to pay any or all of the installments, or the interest, out of the separate estate of said Margaret B. Lane, the property in St. Louis should be sold for the payment thereof.

That said Soulard failed to complete said improvements in the time and according to his contract, and that, at the March term of the St. Louis circuit court in the year 1851, said Soulard obtained a decree for the sale of the property in St. Louis, under which decree said property was sold, and purchased by said Soulard for the sum of $6,600; that said first installment formed a part of said decree, and that the proceeds of said sale ought to be applied to the discharge of said installment, that she was a married woman at the time of the execution of the deed of trust for lands in Illinois; that the consideration of the deed of trust had failed, and that it would not be just to allow Soulard to enforce the payment and still hold the property in St. Louis.

The bill further charges that her land has been sold for taxes, and calls upon the court to require the trustees to proceed at law to recover said property, and to enjoin the sale until the title is settled. The answer admits the contract as set out by appellant, alleges that he has completed his contract, admits the proceedings in St. Louis, and sets up the decree in St. Louis as conclusive as to the amount due—to which there is a replication.

This cause was heard before UNDERWOOD, Judge, at August term, 1853, of the St. Clair Circuit Court.

CATON, J. Although many points were raised and ably argued in this case, we shall confine ourselves in the decision to one single question, which is unavoidably decisive of the whole case. The Revised Statutes repealed all the former laws on the subject of conveyances of real estate, and authorized married women within this State to convey their land by joining with their husbands and acknowledging the deeds in a specified way; but no authority was given for married women residing out of this State to convey their lands lying within it. The law thus continued till the act of the 22d of February, 1847, which authorizes married women without the State to convey their lands lying within this State.

In April, 1846, Mrs. Lane, with her husband, executed this deed of trust, in the city of St. Louis, where she then resided. The deed of trust conveys the premises in question to certain trustees, to secure the payment of certain moneys to Soulard. The question is, whether this was a valid conveyance of the premises. We shall not stop to adduce authorities to show, that a feme covert cannot, except she be authorized by an express statute convey her fee-simple title to real estate by deed. She is incapable of doing so at the common law, and hence there can be no law for it, unless it be by statute. Without a statute, she is incapable of conveying by deed as she is by word of mouth. From 1845 to 1847, there was no statute enabling married women, without the state to convey their lands within it. This deed having been made without the authority of law, and against law, was simply void; as void as if it had been expressly prohibited by a positive statute. The second section of the law of 1847, provides that a feme covert not residing in this State, being above the age of eighteen years, may join her husband

in the execution of deeds, &c., of lands lying within this State, and that she shall thereby be barred of her right in like manner as if she was sole, and the acknowledgment of such deed may be made in the same manner as if she was sole, and the section concludes: "And the provisions of this section shall apply to deeds, mortgages, conveyances, powers of attorney, and other writings, heretofore, as well as those which may hereafter be executed." The third section provides that such deeds, &c., which had been or might thereafter be executed without the State and within the United States, and acknowledged or proved in conformity to that statute, should be admitted to record, and read in evidence without further proof. Admitting that here was the deliberate purpose on the part of the legislature, to give effect to conveyances made by married women out of the State, during the two years when they were not authorized to make such conveyances, and the question arises, Had they authority to make such deeds operative? We cannot bring our minds to entertain a doubt that the legislature had no such authority. Notwithstanding this deed of trust, Mrs. Lane was, on the 21st of February, 1847, as much the absolute owner of this land as if she had never made such a deed. That deed affected her right to it in no way whatever, any more than if it had continued a blank piece of paper, or her name had been forged to it by another, instead of being written by herself. She was no more authorized by law to put her name to that deed, so far as giving it effect was concerned, than a stranger had to write it for her. If the legislature could give effect to a deed thus executed against the provisions of the law, then they could make a deed at once which would convey the title. If they could by force of law make her title pass where none had passed before, then it is the law which passes the title and not the deed. It is the act of the legislature and not her own act, which deprives her of her land. If, on the 1st of February, she was the absolute owner of this land, unaffected, uninfluenced, unprejudiced by any thing which she had previously done or suffered, and on the 23rd of February, she had ceased to own it, by whose act had the title passed? Not by her own act, certainly, for she had done nothing in the meantime or previously, which could transfer the title. How then had it passed? By the act of the legislature alone. She had not done it, for she could not in any

way, shape, or form, pass the title; but the legislature had taken her land from her and given it to others. This they are expressly prohibited from doing, by the constitution.

In support of the constitutionality of this law, we have been referred to several decisions in Pennsylvania, and in some other States, and in the Supreme Court of the United States. Nor is this the first time that our attention has been called to these cases. Without, at the present time, expressing any opinion upon the propriety of those decisions, it is sufficient to say, that they are upon cases not like this; but to sustain this law we should have to go further than any of these courts have gone, in sustaining legislative control over titles to real estate. Indeed, the protection intended to be secured by the constitution would be quite thrown down, and they would be left to dispose of the titles of individuals as they please. In those cases the law had authorized the parties to convey, but the conveyances had been imperfectly executed or acknowledged, and the curative laws had been passed to remedy such defects, and to confirm contracts which had been authorized by law to be made. Upon this ground all those decisions were made. But the case before us is quite different. Here, the law authorized no such contract whatever. In each of those cases there was an imperfect or defective execution of a power. Here is a total want of power. There, there was a capacity to act and an attempt made to exercise that capacity. Here was a total incapacity to act, and whatever was attempted to be done, was in direct violation of the law. Here, the party had attempted to do nothing which the law had authorized her to do. Here, there was no defect to remedy, but the entire act was void, not for the want of form, but for the want of power; and we are very clearly of opinion that the legislature could not give effect to a conveyance, which the law prohibited her from making, and thus transfer a title by the mere farce of a legislative act.

The decree of the circuit court must be reversed, and a decree entered in this court, enjoining the trustees named in the deed of trust from proceeding to sell under that deed.

Decree reversed.

CHAPTER XIII.

TORTS AND ANTENUPTIAL LIABILITIES.

Liability of Married Women for Torts and Crimes—In General.

KOSMINSKY v. GOLDBERG.

44 Ark. 401. 1884.

SMITH, J. This action was against the husband alone for defamatory words spoken by the wife. The complaint did not show whether the defendant was present or absent at the time the slander was uttered; and a demurrer to it was sustained for non-joinder of the wife. The plaintiff proposed to amend by stating that the injurious words were spoken in the presence and hearing of the husband; but the amendment was stricken out. By this action we understand the court to have decided that the amendment stated no case materially different from that which had already been adjudged insufficient, and to have insisted that the wife be brought in as a party. The plaintiff declining to plead further, and electing to rest on his amended complaint, final judgment was entered dismissing the action.

For the wife's torts, committed during coverture, the husband is responsible. Such torts may be committed under either of the following circumstances: (1) Where the husband is absent and had no knowledge of the intended act, as in Head v. Briscoe, 5 Carr. & Payne, 484, 24 E. C. L. R. 667, where a man was held answerable for a libel published by his wife, although they were permanently living apart. See, also, Catterall v. Kenyon, 3 Q. B. 309, 40 E. C. L. R. 749. (2) Where the husband is absent, but where the tort is done under his direction and instigation, as in Handy v. Foley, 121 Mass. 259, 23 Am. Rep. 270. (3) Where the husband was present, but the wife acted of her own volition, of which Cassin v. Delany, 38 N. Y. 178, is an example. And (4) where the tort is committed in the com-

pany of the husband, and by his command or encouragement; for instances of which see Daily v. Houston, 58 Mo. 361; Brazil v. Moran, 8 Minn. 236 (Gil. 205), 83 Am. Dec. 772.

In the first three cases they are jointly liable, and the wife must be joined. She is in reality the offending party, and if the marriage should be dissolved by divorce or the death of either spouse before judgment recovered, the liability of the husband ceases. He is joined because she cannot be sued alone. But in the last case supposed, the law considers the tort as committed by the husband, and he alone is liable. To exempt her from liability, however, requires the concurrence of his presence and his command. A wrong done by his direction, but not in his company, does not excuse her; nor does his presence, if unaccompanied by his direction. The rule is stated too broadly in 2 Kent's Com. 149, where it is said, "If committed in his company, or by his order, he alone is liable."

Here the injury is alleged to have been done in the husband's presence, but not at his instigation. Yet his presence raises a presumption that she was acting under compulsion. And therefore the complaint states prima facie a cause of action against him alone. Of course this presumption may be rebutted by proof that he did not authorize or influence her act. Pomeroy's Remedies, § 320; Bliss on Code Pleading, § 85.

The presumption of coercion, arising from the mere presence of the husband in the case of crimes, has been abolished by statute, and the excuse has been left to be made out by proofs. Gantt's Dig. § 1233; Edwards v. State, 27 Ark. 493.

Judgment reversed, with directions to require defendant to answer the amended complaint.

CHAPTER XVI.

DIVORCE AND ALIMONY.

Grounds—Cruelty.

MOSHER v. MOSHER.

16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. Rep. 654. 1907.

Action by Alfred Mosher against Eugenia Mosher. Judgment for plaintiff, and defendant appeals. Affirmed.

SPALDING, J. Action by Alfred Mosher against Eugenia Mosher for divorce, on the ground of extreme cruelty, consisting in intentionally worrying and annoying the plaintiff, and pursuing a systematic course of ill treatment, using profane language, and telling obscene stories, and other acts, all of which are alleged to have caused the plaintiff grievous mental suffering. The defendant denies these charges, and asks affirmative relief, charging the plaintiff with failing to provide her with the necessaries of life, and with repeatedly accusing her of having married him from mercenary motives, and of having loved other men and of her having illicit intercourse with other men. * * *

The plaintiff was a religious man, had been a church member for 35 years, and did not tolerate profanity or vulgarity in his family. One of the principal charges against the defendant was that she was very profane in her conversation in the presence of the plaintiff, and sometimes of third parties, and that she repeatedly told in his presence, and in the presence of his children, obscene stories, some of which are related by witnesses, and it is charged that these were the cause of grievous mental suffering on the part of the plaintiff, and the trial court so found. We cannot assume that the finding of the trial court is erroneous in the absence of evidence to the contrary. Whether the telling of obscene stories and the use of profanity by the

wife in the presence of the husband and others is the cause of grievous mental suffering on the part of the husband depends very largely upon the temperament, religious training, and characteristics of the man, and his degree of sensitiveness to such improprieties. We can imagine a man whose moral nature may be so inactive as to render such conduct on the part of the wife inoffensive, but we think a great majority of men would be humiliated and chagrined by such conduct, which would cause in most cases more grievous mental suffering than other acts more violent in their nature. The evidence on this subject, taken as a whole, we think clearly indicates that it had the effect on the plaintiff which might be expected in a man of ordinary sensibilities and of a high standard of propriety. No general rule can be laid down on this subject, but each case where charges of this nature are made must be governed by its own peculiar facts.

Many other acts are shown to have been committed by the defendant, some of them trifling, and the most of them so, but occurring as they did, at short intervals, in the way they did, they constitute a continuous course of conduct intended to aggravate and annoy the plaintiff. We shall not enter into details regarding these acts, as to do so would serve no purpose, and it is sufficient to say that, taken together, we are of the opinion that they warranted the judgment of the trial court. There is no issue of the marriage. The plaintiff, so far as the records disclose, was patient and considerate to a high degree. The fault-findings, threatenings, and complaints of the defendant seldom brought any retort from him. * * *

The judgment of the district court is affirmed. All concur.

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Prepared by F. W. SCHENK
Librarian, Law School, University of Chicago

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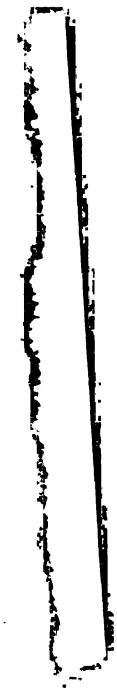

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